Supreme Court, U.S.
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(4)

No. 95-1065

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK
and DWIGHT SAUNDERS,

Petitioners,

-v-

PRO-CHOICE NETWORK OF
WESTERN NEW YORK, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 27, 1995
CERTIORARI GRANTED MARCH 18, 1996

15608

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The following documents are reproduced in the Appendix to the Petition for Writ of Certiorari:

A. Decision of Second Circuit in Banc (9/28/95) A-1

B. Decision of Second Circuit Panel (9/6/94) A-79

C. Decision of Second Circuit in Contempt Appeals, *Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993) A-116

D. Decision and Order (Preliminary Injunction) .. A-134

E. Order to Show Cause (Contempt – Phyllis Walker and Eva Boldt) (dkt. 486) A-187

Note: The text of the preliminary injunction appears as an appendix both to the In Banc decision of the Second Circuit and to the Decision and Order of Feb. 14, 1992 of the District Court. The preliminary injunction is thus set forth in the Appendix to the Petition for Writ of Certiorari at A-33 and again at A-182.

RELEVANT DOCKET ENTRIES

I. U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
No. Civ. 90-1004A

Date	No.	Proceedings
9/24/90	1	Filed Complaint
9/24/90	2	Filed Memorandum of Points and Authorities in Support of Pltfs' Motion for a Preliminary Injunction or in the Alternative for a TRO
	* * *	
9/24/90	3	Filed Order directing defts to appear on 9/26/90 at 10:00 a.m., Part II and show cause why an order should not be entered pursuant to Rule 65 granting pltfs a TRO and/or Preliminary Injunction, etc. – Arcara, DJ * * * (dkt'd 9/25/90) F-348
	* * *	
9/27/90	12	Filed Order temporarily enjoining and restraining defendants in any manner from trespassing, physically abusing or harassing persons entering any facility at which abortions are performed, etc. ordered that failure to comply with this Order shall subject participants to civil damages of $10,000 per day; directing U.S. Marshal to read TRO at site of demonstration; setting trial date for 10/4/90 at 10:00 a.m. – Arcara, DJ * * * (dkt'd 9/27/90) F-348

9/26/90	–	Oral argument on Pltf's motion for TRO; * * * pltf's motion for TRO is also granted; pltfs to prepare order and return to Court on 9/27/90 at 10:00 am; a PI hearing is scheduled for 10/4/90 at 10:00 am
9/27/90	–	Meeting w/counsel; court signs order granting motion for TRO
10/2/90	13	Filed Transcript of Proceedings before Judge Arcara on 9/27/90
	* * *	
10/4/90	17	Filed Order extending court's TRO until 10/19/90 at 5:00 pm or such time as Court rules on defts' motion to dismiss, etc. – Arcara, DJ * * * (dkt'd 10/5/90) F-349
10/4/90	–	Preliminary injunction hearing – adj. generally; defts to file motion to dismiss by 10/9/90; pltfs to file their response by 10/16/90; oral argument on motion to dismiss will be heard on 10/19/90 at 2:00 pm; pltfs to prepare order extending TRO to 10/19/90 until motion to dismiss is decided
10/10/90	18	Filed defts' Notice of Motion for Dismissal and Atty's Fees (ret 10/19/90) with Affidavit of James J. Duane
	* * *	
10/16/90	22	Filed transcript of proceedings held before Judge Arcara on 10/4/90

	* * *	
10/17/90	24	Filed Amended Complaint
	* * *	
10/22/90	29	Filed plfts' Motion for Contempt Agnst the Order of this Court by defts Bonnie Behn & Carla Rainero
	* * *	
10/22/90	32	Filed Petition for Contempt Proceeding for Violation of TRO
10/19/90	–	Oral argument on deft's motion to dismiss; decision is reserved; parties are to submit letters to the court by noon on 10/22/90 summarizing their argument; TRO remains in effect
	* * *	
10/29/90	34	Filed Decision & Order denying defts' motion for this court to abstain from exercising its jurisdiction & either stay or dismiss the complaint; directing the parties to be present for a preliminary injunction hearing on 11-2-90 at 10:00; the TRO issued on 9-27-90 will remain in full force & effect; stating that defts' are not entitled to attys' fees as they are not the prevailing party, etc. – Arcara, DJ * * * (dkt'd 10/29/90) F-349
11/2/90	35	Filed Order extending the Court's TRO and same shall remain in full force & effect until the conclusion of the hearing scheduled to commence 11-15-90, & the determination of the motion for a preliminary injunction. – Arcara, DJ * * *

		(dkt'd 11-7-90) F-350
11/5/90	36	Filed Pltfs' 2nd Amended Complaint
	* * *	
11/2/90	–	Meeting with counsel; defense counsel requests an adjournment of the PI hearing; court grants request and reschedules the hearing for 11/15/90 at 10:00 am (and 11/16/90 if necessary); deft agrees to extending the TRO until 11/16/90 – pltfs to prepare an order
	* * *	
11/13/90	38	Filed defts' Demand for Jury Trial
11/15/90	–	Preliminary injunction hearing – adj. to 11/29/90
	* * *	
12/6/90	40	Filed pltfs' Motion for Contempt Against the Order of this court by deft Nancy Walker
12/6/90	41	Filed pltfs' Petition for Contempt Proceeding for Violation of TRO
	* * *	
12/14/90	44	Filed plfts' Motion for Contempt Against the Order of this Court by deft Nancy Walker
12/14/90	45	Filed Plfts' Petition for Contempt Proceedings for Violation of TRO
1/30/91	–	Contempt hearing; adj. generally
	* * *	
2/11/91	–	Contempt hearing; pltfs call A. Schruefer, D. Warnes & E. Sholes; pltfs rest; deft calls M.A. Romanowski & Bonnie Behn; hearing will continue on 2/12/91 at 10:00 am

	* * *	
2/12/91	–	Contempt hearing; defts call V. Olczak, M. Prestia & S. Jerge; hearing will continue on 2/13/91 at 10:30 am
2/6/91	–	Contempt hearing on petition for contempt proceeding for violation of TRO re deft Nancy Walker; opening statements by pltfs & defts; plfts call L. Baker, R. Harvey & P.J. Davis, M.D.; hearing adj. to 2/8/91 at 10:30 am
2/8/91	–	Contempt hearing continues; pltfs call L. Orlowski, C. Smith, M. Buckham & C. McGuire; Hearing is adj. to 2/11/91 at 10:30 am
2/13/91	–	contempt hearing; defts call N. Walker; hearing will continue on 2/14/91 at 9:15 a.m.
2/27/91	48	Filed defts' Answer to second amended complaint
2/14/91	–	Contempt hearing; defts recall Nancy Walker; as rebuttal witnesses, pltfs call L. Baker, R. Harvey, C. Smith & E. Sholes; defts call surrebuttal witness B. Behn; summations by counsel for pltfs & defts
	* * *	

2/28/91	–	Final pretrial conference – adj. to 3/4/91 at 5:00 pm
3/1/91	49	Filed Order directing * * * in contempt proceeding against deft. Nancy Walker * * * oral argument by counsel of contempt proceeding scheduled for 4/19/91 at 9:30 am; if case not settled by 2/28/91 counsel shall meet w/court on that date at 5:00 pm for pretrial conference; trial of PI shall commence on 3/6/91 at 10:30 am Arcara, DJ * * * (dkt'd 3/5/91) F-354
3/4/91	–	Final pretrial conference; defts' oral motion for deft Nancy Walker to proceed ifp is denied with leave to renew at a later date.
	* * *	
3/6/91	57	Filed Transcript of Proceedings before Judge Arcara on 2/6/91 (1)
3/6/91	58	Filed Transcript of Proceedings before Judge Arcara on 2/8/91 (200)
3/6/91	59	Filed Transcript of Proceedings before Judge Arcara on 2/8/91 (284)
3/6/91	60	Filed Transcript of Proceedings before Judge Arcara on 2/11/91 (436)
3/6/91	61	Filed Transcript of Proceedings before Judge Arcara on 2/11/91 (549)

3/6/91	62	Filed Transcript of Proceedings before Judge Arcara on 2/12/91 (679)
3/6/91	63	Filed Transcript of Proceedings before Judge Arcara on 2/13/91 (881)
3/6/91	64	Filed Transcript of Proceedings before Judge Arcara on 2/13/91 (992)
3/6/91	–	Preliminary injunction hearing; pltfs call Helen Dalley; hearing is adj. to 3/7/91 at 11:00 am
3/7/91	–	Preliminary injunction hearing; pltfs call Deborah Warnes; hearing is adj. to 3/8/91 at 10:30 am
3/8/91	–	Preliminary injunction hearing; pltfs call Elizabeth Sholes; hearing is adj. to 3/13/91 at 10:30 am
3/11/91	65	Filed Transcript of Proceedings before Judge Arcara on 2/14/91 (1140)
3/12/91	66	Filed defendants' Stipulations
	* * *	
3/13/91	68	Filed pltfs' Motion to amend Second Amended Complaint
3/13/91	–	Preliminary injunction hearing; Elizabeth Sholes remains on witness stand; pltfs call Gerald Carriero and Marilyn Buckham; hearing is adj. to 3/14/91 at 10:30 am

3/14/91	–	Preliminary injunction hearing; pltfs call Susan Ward; Marilynn Buckham resumes witness stand; hearing will resume on 3/20/91 at 10:30 am
	* * *	
3/20/91	–	Preliminary injunction hearing; pltfs call Alice Churchill Hoagland, Dr. Paul J. Davis & Dr. Morris Wortman; hearing is adj. to 3/21/91 at 10:00 am; there being no opposition to pltfs' motion to amend the complaint, motion is granted & pltfs are directed to prepare file their 3rd amended complaint
	* * *	
3/25/91	72	Filed Third Amended Complaint
	* * *	
3/26/91	74	Filed pltfs' Notice of Motion and Motion to Hold Paul Schenck, Robert Schenck and Project Rescue in Civil Contempt for Violation of TRO with Petition for Contempt Proceeding (ret 4/1/91)
	* * *	
3/21/91	–	Preliminary injunction hearing; pltfs call S. Camilleri; pltfs rest; * * * hearing adj. to 3/26/91 at 10:00 am
	* * *	
3/26/91	–	Preliminary injunction hearing; deft moves to dismiss the pltfs' motion for PI – motion denied; defts call Joseph Hurst & Karen Swallow Prior; jearing adj. to 3/27/91 at 10:00 am
3/27/91	–	Preliminary injunction hearing; defts call Dr. Richard Romanowski & Karen

		Swallow Prior; hearing adj. to 3/28/91 at 10:00 am
3/28/91	–	Preliminary injunction hearing; Karen Swallow Prior remains on stand; defts call Michael Prestia; hearing adj. to 4/1/91 at 11:00 am
	* * *	
4/1/91	–	Preliminary injunction hearing; Defense witness Michael Prestia resumes stand; defts call Jane Roe & Jane Poe; defts rest; * * * oral argument on pltfs' motion for PI scheduled for 6/6/91 at 9:00 am; pltfs to prepare order outlining dates; contempt hearing re Bonnie Behn & Carla Raniero will commence on 5/3/91 at 10:00 am
	* * *	
4/15/91	79	Filed Order directing * * * oral argument of preliminary injunction proceeding will be held on 6/6/91 at 9:30 am, etc. – Arcara, DJ * * * (dkt'd 4/18/91)
4/15/91	80a &b	Filed transcript of proceeding held 3/6/91 (2 volumes)
4/15/91	81	Filed transcript of proceeding held 3/7/91.
4/15/91	82 &b	Filed transcript of proceeding held 3/8/91. (2 volumes)

4/15/91	83	Filed transcript of proceeding held 3/13/91.
4/15/91	84	Filed transcript of proceeding held 3/14/91.
4/15/91	85	Filed transcript of proceeding held 3/20/91.
4/15/91	86	Filed transcript of proceeding held 3/21/91.
4/15/91	87	Filed transcript of proceeding held 3/25/91.
4/15/91	88a &b	Filed transcript of proceeding held 3/26/91. (2 volumes)
4/15/91	89	Filed transcript of proceeding held 3/27/91.
4/15/91	90	Filed transcript of proceeding held 3/28/91.
4/15/91	91	Filed transcript of proceeding held 4/1/91.
4/15/91	92	Filed transcript of proceeding held 3/20/91.

4/19/91	–	Oral argument on pltfs' mtn for contempt-decision reserved; adj. contempt hearing from 5/3/91 to 6/17/91 & 6/18/91.
5/3/91	–	Contempt hearing adj. to 6/17/91. No appearances.
5/13/91	93	Filed Order directing * * * in PI hearing * * * oral argument will be held on 6/17/91 at 9:30 am, etc. – Arcara, DJ * * * (dkt'd 5/14/91)
	* * *	
5/23/91	95	Filed Amended Scheduling Order directing * * * in PI hearing * * * oral argument on 6/17/91 at 9:30 am, etc. – Arcara, DJ * * * (dkt'd 5/14/91)
6/6/91	96	Filed deft's Answer to pltfs' third amended complaint
6/6/91	–	Oral argument on pltfs' motion for preliminary injunction; adj. to 6/17/91 at 9:30 am
	* * *	
6/17/91	–	Oral argument on pltfs' motion for PI; argument adj. to 6/18/91 at 10:00 am
6/18/91	–	Further argument on pltfs' motion for PI – decision reserved; contempt hearing re Bonnie Behn & Carla Raniero commences; pltfs call D. Warnes, C. McGuire & M. Buckham; *** contempt hearing will continue on 7/8/91 at 10:00

		am
	* * *	
7/8/91	–	Continuation of contempt hearings; witness M. Buckham resumes the stand; pltfs call L. Zorfas, pltfs rest; defts call B. Toth; hearings are adjourned to 7/11/91 at 10:30 am
7/11/91	–	Continuation of contempt hearings; defts call T. Troy, B. Behn C. Rainero, and R. Krolewicz; defense rests; hearings adj'd to 7/12/91 at 10:00 am
7/12/91	–	Continuation of contempt hearings; pltfs call as rebuttal witness M. Buckham; * * * oral argument will be heard on 9/13/91 at 9:30 am re scheduling of contempt hearings re both Revs. Schenck, defense atty. is to contact the court to schedule a status conference; defts' motion to extend the stay of discovery will be discussed at the next status conference
7/16/91	101	Filed transcript of proceeding before Judge Arcara on 6/18/91
7/16/91	102	Filed transcript of proceeding before Judge Arcara on 7/8/91
7/16/91	103	Filed transcript of proceeding before Judge Arcara on 7/11/91
7/16/91	104	Filed transcript of proceeding before Judge Arcara on 7/12/91

	* * *	
8/1/91	106	Filed Order denying defts' motion for a stay of discovery pending the outcome of a related case in the U.S. Supreme Court; staying further discovery until the date of this court's decision of pltfs' motion for PI; trial to commence on 10/7/91 at 10:00 am; pretrial conference re contempt motion will be held on 10/4/91 at at 2:00 pm, etc. – Arcara, DJ * * * (dkt'd 8/2/91) F-359
	* * *	
9/13/91	–	Oral argument before Judge Arcara on pltf's motion for contempt as to Behn and Rainero. Adj'd to 10/5/91, 9:00. No appear.
	* * *	
10/4/91	–	Prehearing conference
	* * *	
10/5/91	–	Oral arguments on motion for contempt; court will reserve decision; deft's atty Duane to accept service of decision for all named defts; Duane to do letter advising Court of preservation of evidence under discovery request
	* * *	
10/17/91	–	Contempt hearings resume with pltfs' witness David Crossland; pltfs pltfs call witness Warnes; hearings adjourned to 10/18/91 at 9:30 am to resume with cross-examination of witness Warnes;
10/16/91	–	Contempt hearings resume w/pltfs' witness Elizabeth Scholes; pltfs call

witnesses Carioro & Crossland; hearings adjourned to 10/17/91 at 10:00 am to resume w/cross-examination of witness Crossland

10/18/91 – Contempt hearings resume w/pltfs' witness Warnes, Carriero & Robert Schenck; pltfs rest; defts move to dismiss petition against the Schencks and pltfs' motion to hold defts in contempt be denied; deft joins in motion with respect to Project Rescue & also moves that Project Rescue is not a properly sued party in action; under Rule 41B the court declines to render judgment until presentation of all evidence; * * * hearings adj'd to 10/24/91 at 9:00 am

* * *

10/22/91 117 Filed Transcript of Procceings before Judge Arcara on 10/18/91

10/22/91 118 Filed Transcript of Proceedings before Judge Arcara on 10/15/91

* * *

10/24/91 – Continuation of contempt hearings; hearings resume with deft calling witnesses D. Smith, D. Marriott, J. Prestia & R. Krolewicz; * * * hearings will resume at 10:00 am on 10/25/91 w/witness Krolewicz

10/25/91 – Contempt hearings resume with witness Krolewicz; hearing adjourned to 10/28/91 at 10:00 am * * *

10/28/91 – Contempt hearings resume with deft calling witnesses M. Buckham & Rev. Paul Schenck; hearings adjourned to 10/30/91 at 10:00

10/30/91 – Contempt hearings resume with deft's witness Rev. Robert Schenck; hearings adjourned to 10/31/91 at 9:00 am to continue with witness R. Schenck

10/31/91 – Contempt hearings resume with deft's witness R. Schenck; hearings adjourned to 11/1/91 at 10:00 am

11/1/91 – Contempt hearings resume with deft's witness Rev. Paul schenck; adjd to 11/4/91 at 10:00 am to continue with witness P. Schenck

11/4/91 – Contempt hearings; hearing resumes w/witness P. Schenck; hearings adjourned to 11/5/91 at 10:00 am

11/5/91 – Contempt hearings; hearing resumes w/witness P. Schenck; defense rests; hearing adjd to 11/8/91 at 4:00 pm for oral argument re rebuttal witnesses

* * *

1/3/92 124 MOTION by Pro-Choice Network set Contempt Hearing to hold deft Paul Schenck & Daren Drzymala in civil contempt , Hearing set for 2/5/92 at 9:00 **THIS ITEM IS 124 A** (it) [Entry date 01/09/92] [Edit date 05/26/92]

1/7/92	–	Minute entry: Hearing cont'd from 11/8/91. Expert witness testimony. Exam. by pla's witness, Albarella. Adj'd to 1/30/92 for testimony of dft's expert. (fm) [Entry date 01/16/92]
	* * *	
2/14/92	125	ORDER granting plaintifs' motion for Preliminary Injunction and denying defendants' motion to dismiss action based on the abstention doctrine. (signed by Judge Richard J. Arcara) * * *
2/14/92	126	ORDER, for Preliminary Injunction that defts and all other persons acting in their behalf are enjoined & restrained from trespassing, demonstrating, physically abusing, etc. persons entering or leaving any facility at which abortions are performed, etc.; ordered that failure to comply w/order shall subject participants to civil damages of $10,000 per day, etc; that this order shall remain in full force & effect until modified by further order or until final resolution by this Court (signed by Judge Richard J. Arcara) * * *
3/11/92	–	Minute entry:, Hearing set for 5/27/92 at 10:00 & 5/28/92 at 9:00 (it) [Entry date 03/16/92]
3/12/92	127	TRANSCRIPT of proceedings held before Judge Arcara on 10/15/91 (it) [Entry date 03/13/92]

3/12/92	128	TRANSCRIPT of proceedings before Judge Arcara on 10/16/91 (it) [Entry date 03/13/92]
3/12/92	129	TRANSCRIPT of proceedings before Judge Arcara on 10/17/91 (it) [Entry date 03/13/92]
3/12/92	130	TRANSCRIPT of proceedings before Judge Arcara on 10/18/91 (it) [Entry date 03/13/92]
3/12/92	131	TRANSCRIPT of proceedings before Judge Arcara on 10/24/91 (it) [Entry date 03/13/92]
3/12/92	132	TRANSCRIPT of proceedings before Judge Arcara on 10/25/91 (it) [Entry date 03/13/92]
	* * *	
3/13/92	134	MOTION by Paul Schenck, Dwight Saunders to Stay Preliminary Injunction (it)
	* * *	
3/13/92	136	NOTICE OF APPEAL by Paul Schenck, Dwight Saunders . Fee Status: Paid $105.00 recceipt #41622 * * *
	* * *	
3/20/92	138	TRANSCRIPT of proceedings before Judge Arcara on 10/28/91 (it)
3/20/92	139	TRANSCRIPT of proceedings before Judge Arcara on 10/30/91 (it)

3/20/92	140	TRANSCRIPT of proceedings before Judge Arcara on 11/1/91 (it)
3/20/92	141	TRANSCRIPT of proceedings before Judge Arcara on 11/4/91 (it)
3/20/92	142	TRANSCRIPT of proceedings before Judge Arcara on 11/5/91 (it)
3/20/92	143	TRANSCRIPT of proceedings before Judge Arcara on 11/8/91 (it)
3/24/92	144	TRANSCRIPT of proceedings before Judge Arcara on 10/31/91 at 9:15 a.m. (Vol. 9) (it)
3/24/92	145	TRANSCRIPT of proceedings before Judge Arcara on 1/7/92 (it)
3/24/92	146	TRANSCRIPT of proceedings before JUDGE Arcara on 1/30/92 (it)
	* * *	
5/27/92	–	Minute entry:, Contempt hearings re Daren Dryzmala & Paul Schenck; parties make opening statements, witnesses called; reset Contempt Hearing for 9:00 5/28/92 (it) [Entry date 06/02/92]
5/28/92	–	Minute entry:, Contempt hearings re Dryzmala & Schenck continue; defts each move to dismiss case for failure to prove; court declines ruling on motions until close of all evidence in case; reset Contempt Hearing (summations) for 2:00

		7/20/92, set Findings of Fact & Conclusions of Law deadline to 7/6/92; any replies to be filed by 7/17/92 (it) [Entry date 06/02/92]
	* * *	
6/25/92	231	TRANSCRIPT of proceedings before Judge Arcara on 5/5/92 (it)
6/25/92	232	TRANSCRIPT of proceedings before Judge Arcara on 5/28/92 (it)
	* * *	
7/24/92	238	ORDER granting plas' petitions for civil contempt agnst def. Nancy Walker re violations occurring 11/29 & 12/1/90; and for Sanctions imposes $10,000 civil dmgs, $20,000 fine for a total of $30,000 agnst def. Walker. Directing entry of judgment agnst said def in the amt of $10,000, payable to plas. Paul Davis, M.D., & Bflo GYN Womenservice and the remaining $20,000 payment is contingent on any future violations of the Prel. Injun. The court denies plas' petition for civil contempt re violation alleged to have occurred 12/8/90. (signed by Judge Richard J. Arcara) * * * [Entry date 07/28/92] [Edit date 08/14/92]
	* * *	
8/14/92	241	ORDER, granting pltfs' petition for civil contempt agnst defts Behn and Reinero, judgment against both Behn & Rainero in the amt of $10,000 each; granting pltfs' request for Attorney Fees & costs, setting pltfs' filing of Affidavit for attys fees &

costs deadline to 9/18/92, set defts' responses to 10/16/92 (signed by Judge Richard J. Arcara) * * *

* * *

9/14/92	250	ORDER, granting pltfs' petition for civil contempt agnst Rev. Paul Schenck, Rev. Robert Schenck & Project Rescue in the amt of $10,000 each; pltfs' request for attys' fees & costs granted; pltfs to file affidavit of attys' fees & costs by 10/16/92 and defts shall respond by 11/6/92; (signed by Judge Richard J. Arcara) * * *

* * *

9/28/92	263	ORDER granting pltfs' [124-1] motion for civil Contempt against Paul Schenck & Daren Drzymala; directing Rev. Paul Schenck to pay sum of $20,000 to the Clerk of the Court by 4:30 p.m. on 1/29/93 in the form of a bank check payable to Clerk of the US District Court; Judgment against Rev. Daren Drzymala in the amount of $10,000; set pltfs' Affidavit/Brief of attys' fees & costs deadline to 11/18/92, Defts Schenck & Drzymala's Response to pltfs' Affidavit set for 12/16/92 (signed by Judge Richard J. Arcara) * * *

II. U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT
No. 92-7302

3/24/94	Oral argument (before panel)

7/22/94	Letter sent to counsel requesting letter briefs addressing effect of Madsen decision
9/6/94	Decision (of panel)
9/26/94	Order (granting ten-day extension of time for filing of petition for rehearing with suggestion for rehearing in banc from Sept. 20, 1994 to Sept. 30, 1994)
10/3/94	Mandate
10/13/94	Order (granting leave to file petition out of time and recalling mandate)
10/13/94	Petition for rehearing and suggestion for rehearing in banc
12/30/94	Order (granting rehearing in banc limited to certain issues)
2/2/95	Order (reinstating preliminary injunction as issued on Feb. 14, 1992)
4/17/95	Oral argument (before in banc court)
9/28/95	Decision (of in banc court)
10/11/95	Transcript of in banc argument

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

Plaintiffs,

vs.

PROJECT RESCUE WESTERN NEW YORK, et al.,

Defendants.

TEMPORARY RESTRAINING ORDER

CIV 90-1004A

Upon hearing held September 26, 1990, and upon the summons and complaint filed herein and the affidavits of Isabel Marcus, Esq., Marilynn Buckham, subscribed and sworn on September 21, 1990, Paul J. Davis, M.D. subscribed and sworn on September 21, 1990, Shalom Press, M.D., David A. Collins, subscribed and sworn on September 20, 1990, Cathleen McGuire, subscribed and sworn on September 21, 1990, Deborah J. Warnes, subscribed and sworn on September 22, 1990, and Lauren Zorfas, subscribed and sworn on September 21, 1990, and the supporting exhibits attached to such affidavits, and the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction, all of which are incorporated and attached herein, it is hereby

ORDERED THAT Defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual notice of this Order, are:

1. Temporarily enjoined and restrained in any manner or by any means from:

(a) trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility at which abortions are performed in the Western District of New York, including demonstrating within 15 feet of any person seeking access to or leaving such facilities, except that sidewalk counseling by no more than two persons as specified in paragraph (b) shall be allowed;

(b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed; Provided, however, that sidewalk counseling, consisting of a conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, or who is sought to be counseled who wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event the persons seeking to counsel that person shall cease and desist from such counseling of that person. In addition, provided that this right to sidewalk counseling as defined herein shall not limit the right of the Police Department to maintain public order or reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site;

(c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of a health care facility where abortions are performed in the Western District of New York, nor shall any person make such sounds which interferes with the rights of

anyone not in violation of this Order;

(d) attempting, or inducing, encouraging, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a), (b) and (c) above; and it is further

ORDERED that nothing in this Order shall be construed to limit Project Rescue participants' exercise of their legitimate First Amendment rights; and it is further

ORDERED that the defendant organization and their officers, and all individual defendants and those acting in concert with them, shall make good faith effort to instruct all organizations and individuals they believe to be planning to participate in any of the activities enumerated above not to engage or participate in the activities enjoined in paragraphs (a) through (d) above; and it is further

ORDERED that the failure to comply with this Order by any Project Rescue participant or participant in any of the activities enjoined in paragraphs (a) and (d) above with actual notice of the provisions of this Order shall subject him or her to civil damages of $10,000 per day for the first violation of this Order; and it is further

ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fines; and it is further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further Order of the Court; and it is further

ORDERED that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in relation to the enforcement of this Order.

2. IT IS FURTHER ORDERED THAT the United States Marshal for the Western District of New York shall read this Temporary Restraining Order as set forth in Paragraph 1 (in its entirety), at the site of a demonstration or protest at a facility at which abortions are performed in the Western District of New York. Plaintiffs' counsel shall be responsible for notifying the Marshal in a timely manner of the location of such demonstration and protest activity.

3. Violations of this Order shall be enforced by appropriate motion.

4. Plaintiffs shall post security pursuant to F.R.C.P. Rule 65, in the amount of $100.

5. It is the Court's intention that nothing contained in this Order shall supersede or diminish the obligation of local and state law enforcement authorities to fulfill their duties and responsibilities in enforcing state laws and local ordinances.

6. IT IS FURTHER ORDERED THAT personal delivery of this Order, the Summons and Complaint, to a Defendant or a person of suitable ago or discretion at the residence, usual place of abode or office of business, of Defendants named in the complaint, or, if there is no one present, leaving such pleadings and papers in a conspicuous place therein, shall constitute good and sufficient service, upon such Defendants and each of them, service of the Order pursuant to F.R.C.P. Rule 5 and service of the Summons and Complaint pursuant to F.R.C.P. Rule 4.

7. Trial of this matter is scheduled for October 4, 1990 at 10:00 a.m.

/s/ Richard J. Arcara
RICHARD J. ARCARA
United States District Judge

DATED: Buffalo, New York
September 27, 1990
12:35 P.M.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PRO-CHOICE NETWORK,

v.

PROJECT RESCUE,

Civ. 90-1004A
Statement of Clarification
[excerpt of proceeding on Oct. 4, 1990]

We are here to determine whether a temporary restraining order issued by this Court on September 27, 1990 is to be converted into a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Today's hearing was scheduled after last week's proceeding at which plaintiffs and any defendants who appeared were given an opportunity to speak.

As I noted on Wednesday, September 26, 1990, Rule 65 authorizes the issuance of a temporary restraining order ex parte.

Plaintiffs did not request an ex parte proceeding, but did present substantial evidence on Wednesday concerning the difficulty they were experiencing effecting service. Two of the named defendants, Joyce Strigel and John Tomasello, did appear on that day.

I determined that based on the evidence the plaintiffs presented, that the named defendants were planning one or more demonstrations for Friday, September 28, 1990, it was appropriate to proceed with an application for a temporary restraining order despite the unavailability of all the defendants.

On Thursday September 27, defendants, the Rev. Paul Schenck and Dwight Saunders, who is an attorney, also appeared. They were given an opportunity to address the Court concerning the temporary restraining order which the Court had decided to issue at the conclusion of Wednesday's proceeding.

At that time, there was certain dialogue between the Court and the parties which apparently has been used either through misunderstanding or misinterpretation to present certain misrepresentations to the public of the contents and meaning of this Court's order.

I have carefully reviewed my notes and the transcript of last week's proceedings and it was made clear on numerous occasions that it was the function of this Court to apply the law and to give each party a full and fair hearing.

It is precisely because this Court wanted to be fully apprised of the facts of this case that I accorded all parties present an opportunity to speak or to file motions which they or their attorneys deemed appropriate.

It is necessary, however, where a party seeks a temporary restraining order that the Court consider that request expeditiously – indeed it is mandated by the Federal Rules of Civil Procedure.

I fully understood that all defendants who appeared last week were limited in the time available to them to seek legal advice. I also recommended to those individual defendants that they obtain legal counsel and file whatever papers they desired the Court to consider.

To date, the Court has not received any motions or

responses to the plaintiff's papers from the defendants.

Therefore I have decided that the purpose of today's hearing will be to determine whether the temporary restraining order granted last week should be converted to a preliminary injunction.

I would, however, like to address one matter of concern to this Court which I previously alluded to – that either through misunderstanding or misinterpretation of the temporary restraining order there has been created certain misrepresentations of the contents and meaning of this Court's order.

Unfortunately, members of the clergy and the public have concluded, or have been led to believe, that this temporary restraining order infringes upon either the rights of the clergy to preach to their congregations or on the rights of free speech and freedom of religion as guaranteed under the first amendment of the United States Constitution.

This is just not true.

Again, based on review of my notes and the proceedings of last week, it never was intended or expressed by this Court that this order prohibited any clergyman or individual from preaching from the pulpit, quoting from the Bible or practicing any rights protected by the first amendment.

The temporary restraining order is structured to protect the rights of all parties, and is directed to activities at the sites chosen for demonstrations.

The order was specifically addressed to any individual

who interferes with the constitutional rights of others seeking access to various medical facilities and doctors services.

The order also was structured to protect the first amendment rights of those who seek to demonstrate and further provided for demonstrators to engage in limited counseling in conformity with their individual beliefs.

The order of the Court will remain in effect pending the conclusion of this hearing or until a subsequent order is issued.

RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PRO-CHOICE NETWORK OF
WESTERN NEW YORK;
BUFFALO GYN WOMENSERVICES,
P.C.; ERIE MEDICAL CENTER;
PAUL J. DAVIS, M.D., P.C.;
SHALOM PRESS, M.D.; BARNETT
SLEPIAN, M.D., MORRIS
WORTMAN, M.D; HIGHLAND
OBSTETRICAL GROUP;
ALEXANDER WOMEN'S GROUP.

Plaintiffs,

vs.

CASE NO. Civ. 90-1004A

SECOND AMENDED COMPLAINT
(Civil Rights)

PROJECT RESCUE WESTERN NEW YORK; OPERATION RESCUE; PROJECT LIFE OF ROCHESTER; REV. PAUL SCHENCK; REV. JAMES L. EVANS; REV. TED CADWALLADER; DWIGHT SAUNDERS; DAVID ANDERSON; JEFFREY BARAN; BRIAN BAYLEY; BONNIE BEHN; RONALD BREYMEIER; GILBERT CERTO; SCOTT CHADSEY; KIM DAY; CONSTANCE DEBO; MARK DENT; WAYNE DENT; PAUL DIEMERT; JOAN GIANGRECO; DELORES GLASER; CARMELINA GOLBA; KEVIN GOLBA; LINDA HALL; NANCY HALL; THOMAS HALL; REV. DANIEL HAMLIN; JAMES HANDYSIDE; PAMELA HUFFNAGLE; DONNA JOHANNS; ERIC JOHNS; NEAL KOCHIS; PAULETTE LIKOUDIS; CHARLES MCGUIRE; CHRISTOPHER MORROW; ANNEMARIE NICE; NICHOLAS PUKALO; CARLA RAINERO; THOMAS RILEY; PATRICIA OSTRANDER; LINDA ROSS; DAVID SMITH; LINDA SMITH; MARK STERLACE; JOYCE STRIGEL; JOHN THOMANN; JOHN TOMASELLO; PAUL WALDMILLER, JR; NANCY WALKER; LEONARD

WINTER; HORACE WOLCOTT; GERALD CRAWFORD; DAVID LONG; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

Defendants.

FIRST CAUSE OF ACTION

(Violation of 42 U.S.C. Section 1985(3)
(Violation of Right to Travel,Right to Obtain Abortion)
(By all Plaintiffs Against all Defendants)

The plaintiffs, by their attorneys, complain of the defendants and allege:

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief under 42 U.S.C. section 1985(3) and state statutory and common law. This complaint is addressed to impending actions directly threatening the health and safety of thousands of women seeking abortions or other gynecological and family planning services in clinics and other facilities in western New York on September 28,

1990 and during the month of October 1990 which has been proclaimed as National Rescue Month by defendant organization Operation Rescue as well as to future actions. Plaintiffs, who include an organization representing women who have been or believe they will be denied access to health care providers, women's health care clinics in western New York, and doctors in western New York, seek a limited injunctive order ensuring that defendants' announced conspiracy does not infringe plaintiffs' constitutional, statutory, and common law rights to obtain and provide abortions and other family planning and medical services and to enjoy protection from tortious interference with their exercise of these rights. Plaintiffs require immediate injunctive relief to forestall a meticulously planned action scheduled for September 28, 1990, called a "rescue" organized by "Project Rescue Western New York" (hereinafter "Project Rescue") as well as continuing actions during National Rescue month (October 1990) proclaimed by Operation Rescue and executed by its local affiliates in western New York (Project Rescue and Project Life of Rochester) and future actions organized by defendant Project Rescue and defendant Project Life of Rochester (hereinafter "Project Life"). These planned actions involve the blockade of family planning clinics and doctors' offices within western New York, and the harassment of patients and staff of these facilities, by defendant organizations and individuals, and others acting in concert with them or on their behalf.

2. Upon information and belief, defendants intend to block access to abortion providers, to obstruct the provision of abortion and other family planning services, and to intimidate, harass and restrain women attempting to use the services of the clinics or individual physicians. Defendants actions are scheduled to take place in western New York on September 28, 1990, at varying times and dates during October 1990 and at unspecified dates in the future but defendants purposely have not indicated

which providers they will specifically target in order to frustrate efforts to protect the affected facilities and patients. Defendants' actions will greatly increase the health risks faced by women seeking counseling, abortions, and other services in the targeted facilities, and therefore plaintiffs require immediate injunctive relief.

JURISDICTION AND VENUE

3. This court has jurisdiction of the subject matter of this action under 28 U.S.C. section 1331 in that plaintiffs allege violations of federal law. In addition, jurisdiction is proper under 42 U.S.C. section 1985 (3), 28 U.S. 1343 and the doctrine of pendent jurisdiction.

4. Venue in this District is proper under 28 U.S.C. section 1391 (b) because the claims arise here.

PARTIES

Plaintiffs

5. Plaintiff Pro Choice Network of Western New York (hereinafter PCN) is a not-for-profit corporation located in Buffalo, New York. It has over four thousand members including women who have utilized family planning and abortion services in western New York or will utilize such services on September 28, 1990 and in the future. PCN is dedicated to maintaining legal and safe access to family planning and abortion services.

6. Plaintiff Buffalo Gyn Womenservices P.C. is a health care facility that provides abortions and other family planning services located in Buffalo, New York. It sues on behalf of itself, its staff and its patients.

7. Plaintiff Erie Medical Center is a health care facility that provides abortions and other family planning services located in Buffalo, New York. It sues on behalf of itself, its staff, and its patients.

8. Plaintiff Paul Davis M.D. is a physician providing abortions and other family planning services in his office located in Amherst, New York. He sues on behalf of himself, his staff, and his patients.

9. Plaintiff Shalom Press M.D. is a physician providing abortions and other family planning services in his offices located in Buffalo, New York and Kenmore, New York. He sues on behalf of himself, his staff, and his patients.

10. Plaintiff Barnett Slepian M.D. is a physician providing abortions and other family planning services in his office located in Amherst, New York and at Buffalo Gyn Womenservices and Erie Medical Center located in Buffalo, New York. He sues on behalf of himself, his staff, and his patients.

11. Plaintiff Morris Wortman M.D. is a physician providing abortions and other family planning services in his office located in Rochester, New York. He sues on behalf of himself, his staff and his patients.

12. Plaintiff Highland Obstetrical Group is a medical group that provides abortions in their offices at Highland Hospital, Rochester, New York. They sue on behalf of themselves, their staff, and their patients.

13. Plaintiff Alexander Women's Group is a medical group that provides abortions in Rochester, New York. They sue on behalf of themselves, their staff, and their patients.

Defendants

14. Upon information and belief, defendant Project Rescue Western New York (hereinafter "Project Rescue") is an unincorporated organization and association of individuals with offices in Buffalo, New York. Its purpose is to organize and coordinate disruptions of the operations of abortion and family planning facilities. It calls these disruptions "rescues". The aim of "rescues" is to prevent clinic employees, physicians or patients from entering health care facilities so as to shut down such facilities. Project Rescue has announced that such a "rescue" will occur in the Buffalo area on September 28, 1990. Project Rescue's literature lists its address as P.O. Box 284, Buffalo, New York 14223, its office telephone number as 716-694-8623 and its hotline number as 716-694-8578.

15. Upon information and belief, defendant Operation Rescue (hereinafter "the Operation") is a group of organizations, including Project Rescue Western New York, and individuals, with offices in Binghamton, New York. Its purpose is to organize and coordinate disruptions of abortion and family planning facilities including the blockade scheduled in the Buffalo area on September 28, 1990. The Operation's literature lists its address as P.O. Box 3214, Binghamton, New York 13902-3214, and its telephone number as 607-723-4012.

16. Upon information and belief, defendant Project Life is an unincorporated organization and association of individuals with offices in Rochester, New York. Its purpose is to organize and coordinate disruptions of the operations of abortion and family planning facilities. It calls these disruptions "rescues". The aim of "rescues" is to prevent clinic employees, physicians or patients from entering health care facilities so as to shut down such facilities. Project Life has organized such disruptions in

Rochester during October 1990 and on numerous past occasions. Its address is 342 Arnett Boulevard, Rochester, New York and its phone number is 716-235-1611.

17. Upon information and belief, defendant Rev. Paul Schenck, acting in concert with the other defendants and others unknown, is a director of Project Rescue. He is also a pastor of New Covenant Tabernacle Church, 345 McConkey Drive, Tonawanda, New York. In his capacity as pastor and in his capacity as one of the leaders of Project Rescue he plans, organizes, directs, coordinates, and participates in, and aids and abets others who participate in disruptions of health care facilities that provide abortion and family planning services. He was arrested and convicted for blockading such a facility at 260 Elmwood Avenue, Buffalo, New York on October 29, 1988, for chaining himself together with certain other named defendants inside the health care facility at 260 Elmwood Avenue, Buffalo, New York, on April 7, 1989, and for blockading at 1241 Main Street, Buffalo, New York on September 23, 1989. He resides in Tonawanda, New York.

18. Upon information and belief defendant Rev. James Evans, acting in concert with other defendants and others unknown,is a co-ordinator, organizer and participant in, and aider and abettor of, disruptions of health care facilities sponsored by the Operation or by Project Rescue. He has served as an official (Political Liason) of the Operation and he has directed and participated in blockades in Buffalo, New York and in Kenmore, New York. He was arrested and jailed for chaining himself on February 17, 1989 to certain other named defendants inside the facilities operated by plaintiff Doctor Shalom Press, 666 Colvin Avenue, New York. He was present at the October 28, 1989 blockade of plaintiff Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York and on that occasion he was

directing other defendants and other blockaders and was communicating with other leaders with a walkie-talkie device. He is a resident of Binghamton, New York.

19. Upon information and belief, defendant Ted Cadwallader, acting in concert with other defendants and others unknown, is a co-ordinator, organizer and participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade of plaintiff Doctor Shalom Press' office, 666 Colvin Avenue, Kenmore, New York on February 17, 1989 and for chaining himself together with certain other named defendants inside the health care facilities at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York on April 7, 1989. He resides in Tonawanda, New York.

20. Upon information and belief, defendant Dwight Saunders, acting in concert with other defendants and others unknown, is a co-ordinator, organizer and participant in and aider and abetter of disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. Defendant Saunders is an attorney with law offices at 5695 Main Street, Williamsville, New York, who has encouraged, incited, and counselled other defendants named and others unknown to violate the law. He was arrested and convicted for his participation in a Project Rescue blockade at plaintiff Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York on October 28, 1989. He was one of the leaders of that blockade. He resided in Tonawanda, New York.

21. Upon information and belief, defendant David Anderson, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions

of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 28, 1989 at 1241 Main Street, Buffalo, New York. He resides in Alden, New York

22. Upon information and belief, defendant Jeffrey Baran, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 29, 1988 at 260 Elmwood, Buffalo, New York, and October 28, 1989 at 1241 Main Street, Buffalo, New York. He resides in Clarence, New York.

23. Upon information and belief, defendant Brian Bayley, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 29, 1988 at 260 Elmwood, Buffalo, New York, February 17, 1989 at 666 Colvin Blvd., Kenmore, New York, October 11, 1989 at 305 Linwood Avenue, Buffalo, New York, and October 28, 1989 at 1241 Main Street, Buffalo, New York. He resides in Amherst, New York

24. Upon information and belief, defendant Bonnie Behn, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for harassing people at 1241 Main Street, Buffalo, New York on September 16, 1989 and arrested and convicted for criminal trespass at 1241 Main Street, Buffalo, New York on October 31, 1989. She resides in Cheektowaga, New York

25. Upon information and belief, defendant Ronald Breymeier, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 29, 1988 at Buffalo Gyn Womenservices, 260 Elmwood, Buffalo, New York. He resides in Depew, New York

26. Upon information and belief, defendant Gilbert Certo, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for chaining himself together with certain other named defendants inside the health care facility at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York on April 7, 1989. He resides in Niagara Falls, New York

27. Upon information and belief, defendant Scott Chadsey, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 29, 1988 at Buffalo Gyn Womenservices, 260 Elwmood Avenue, Buffalo, New York and for chaining himself together with certain other named defendants inside the same facility on April 7, 1989. He resides in Lancaster, New York

28. Upon information and belief, defendant Kim Day, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services

in the Buffalo area. She was arrested and convicted for participating in blockades on October 29, 1988 at Buffalo Gyn Womenservices, 260 Elwmood Avenue, Buffalo, New York, on April 28, 1989 at the facilities of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York, and on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She was also arrested and convicted for chaining herself together with certain other named defendants at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York on October 11, 1989. Defendant resides in Kenmore, New York.

29. Upon information and belief, defendant Constance Debo, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for participating in a blockade on October 28, 1988 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in Springville, New York.

30. Upon information and belief, defendant Mark Dent, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Lockport, New York.

31. Upon information and belief, defendant Wayne Dent, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for

participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Lockport, New York.

32. Upon information and belief, defendant Paul Diemert, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Lockport, New York.

33. Upon information and belief, defendant Joan Giangreco, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for participating in a blockade on August 25, 1989 at Erie Medical Center, 50 High Street, Buffalo, New York and on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in North Tonawanda, New York.

34. Upon information and belief, defendant Delores Glaser, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in Buffalo, New York.

35. Upon information and belief, defendant Carmelina Golba, acting in concert with other defendants and others

unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for chaining herself together with certain other named defendants at the offices Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York, on October 11,1989, and for trespass during a blockade on February 17, 1990 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. On April 19,1990 she was issued an order of protection in connection with her conviction for her activities on February 17, 1990 and was back in court on charges of violating that order of proptection on May 14, 1990. She resides in Buffalo, New York.

36. Upon information and belief, defendant Kevin Golba, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Buffalo, New York.

36. Upon information and belief, defendant Linda Hall, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in Clarence, New York.

37. Upon information and belief, defendant Nancy Hall, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health

care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for chaining herself together with certain other named defendants at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York on April 7, 1989. She resides in Cheektowaga, New York.

38. Upon information and belief, defendant Thomas Hall, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Clarence, New York.

39. Upon information and belief, defendant Rev. Daniel Hamlin, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Williamsville, New York.

40. Upon information and belief, defendant James Handyside, acting in concert with other defendants and others unknown is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in West Seneca, New York.

41. Upon information and belief, defendant Pamela Huffnagle, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for trespass on May 17, 1989 at Buffalo Gyn Womenservices, 260 Elmwood Avenue, and September 12, 1989 at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York. She resides in Buffalo, New York.

42. Upon information and belief, defendant Donna Johanns, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in Buffalo, New York.

43. Upon information and belief, defendant Eric Johns, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street,Buffalo, New York. He resides in Lockport, New York.

44. Upon information and belief, defendant Neal Kochis, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for

participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in North Tonawanda, New York.

45. Upon information and belief, defendant Paulette Likoudis, acting in concert with other defendants and others unknowns is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for participating in a blockade on August 25, 1989 at Erie Medical Center, 50 High Street, Buffalo, New York. She resides in Williamsville, New York.

46. Upon information and belief, defendant Charles McGuire, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 29, 1988 at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York, and for trespass on December 22, 1989 at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York. He resides in Kenmore, New York.

47. Upon information and belief, defendant Christopher Morrow, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Kenmore, New York.

48. Upon information and belief, defendant Annemarie

Nice, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for chaining herself together with certain other named defendants on October 11, 1989 at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York. She resides in Machias, New York.

49. Upon information and belief, defendant Nicholas Pukalo, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 29, 1988 at Buffalo Gyn Womenservices, 260 Elwmood Avenue, Buffalo, New York, and on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in North Tonawanda, New York.

50. Upon information and belief, defendant Carla Rainero, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for trespass on October 11, 1989 at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York. She resides in Tonawanda, New York.

51. Upon information and belief, defendant Thomas Riley, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on August 25, 1989 at Erie Medical

Center, 50 High Street, Buffalo, New York and on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Lockport, New York.

52. Upon information and belief, defendant Patricia Ostrander, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for trespass on April 9, 1989 at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York. She was arrested on February 17,1990 for trespass and given an adjournment in contemplation of dismissal. She resides in Buffalo, New York.

53. Upon information and belief, defendant Linda Ross, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for participating in a blockade on October 29, 1988 at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York, and on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in East Aurora, New York.

54. Upon information and belief, defendant David Smith, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for trespass on April 9, 1989 at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York and for disorderly conduct on February 10, 1990 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Kenmore, New York.

55. Upon information and belief, defendant Linda Smith, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for trespass on February 17, 1989 at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York. She resides in Kenmore, New York.

56. Upon information and belief, defendant Mark Sterlace, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for trespass on February 17, 1989 at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York and was arrested on April 12,1989 and December 1, 1989 at the Alexander Women's Group offices in Rochester, New York. He resides in Cheektowaga, New York.

57. Upon information and belief, defendant Joyce Strigel, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in Lancaster, New York.

58. Upon information and belief, defendant John Thomann, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for

chaining himself together with certain other named defendants on April 7, 1989 at Buffalo Gyn Womenservices, 260 Elwmood Avenue, Buffalo, New York. He resides in Clarence, New York.

59. Upon information and belief, defendant John Tomasello, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on August 25, 1989 at Erie Medical Center, 50 High Street, Buffalo, New York. He resides in Buffalo, New York.

60. Upon information and belief, defendant Paul Waldmiller, Jr., acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for harassment on September 2, 1989, at Erie Medical Center, 50 High Street, Buffalo, New York. He resides in Snyder, New York.

61. Upon information and belief, defendant Nancy Walker, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for participating in a blockade or trespassing on February 17, 1989 at the offices of Dr. Shalom Press, 666 Colvin Avenue, Kenmore, New York, on September 16, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York, on October 11, 1989 at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York and on October 31, 1988 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She

resides in Lancaster, New York.

62. Upon information and belief, defendant Leonard Winter, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Tonawanda, New York.

63. Upon information and belief, defendant Horace Wolcott, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Lockport, New York.

64. Upon information and belief, defendant Gerald Crawford, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in Rochester, New York. He was arrested and convicted for participating in a blockade of the office of Doctor Morris Wortman on September 24,1988 in Brighton, New York. He was arrested for blockading the offices of the Alexander Women's Group in Rochester, New York on April 26, 1989, on December 1, 1989, and on March 29, 1990. He resides in or around Rochester, New York.

65. Upon information and belief, defendant David Long, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Rochester area. He is one of the leaders of defendant Project Life. He was arrested and convicted for participating in a blockade of the office of Doctor Morris Wortman on September 24, 1988 in Brighton, New York. He was arrested for a blockade of the offices of the Alexander Women's Group on April 12, 1989. He resides in Rochester, New York.

66. Defendants "John Doe(s)" and "Jane Doe(s)" are fictitious names, the real names of said defendants being presently unknown to plaintiffs. These fictitious names are intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

FACTS

67. Some of the defendants, pursuant to a conspiracy that they have entitled "Project Rescue Western New York" plan to obstruct and close down medical facilities at which abortions are performed in western New York on September 28, 1990 and in the future by trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from such facilities, blocking the path of patients, staff and visitors, and otherwise physically disrupting and interfering with the operations of and access to the facilities.

68. Other of the defendants, pursuant to a conspiracy that they have entitled "Project Life of Rochester" plan to obstruct and close down medical facilities at which abortions are

performed in the Rochester area during the month of October 1990 and in the future by trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from such facilities, blocking the path of patients, staff and visitors, and otherwise physically disrupting and interfering with the operations of and access to the facilities.

69. The defendants do not accept the decisions of the United States Supreme Court that the United States Constitution guarantees and protects a woman's right to choose abortion and to carry out that decision, and they intend to interfere with those rights of women attending the targeted clinics and providers.

70. The defendants do not accept the decision of the United States Supreme Court that the United States Constitution protects a woman's right to travel across state lines to obtain medical care including abortion .

71. Some of the defendants have informed and encouraged others to join with them on September 28, 1990 through a pamphlet announcement of their "Regional Rescue Mission" for western New York and on their hotline telephone message at 716-694-8578.

72. Upon information and belief, and according to the Project Rescue pamphlet, defendants in carrying out the "Rescue" plan to be joined by as many as five hundred (500) others.

73. Defendants' own published plans for the western New York Rescue state specifically that they intend to close down "abortion mills" and specifically to prevent clinic employees or women from entering the clinics. They state that "Previous missions have closed down abortuaries for the day 70% of the time in the Buffalo area...". Defendants' instructions to their co-

conspirators acknowledge that they may be arrested.

74. Defendants have not publicly stated which clinics or facilities in western New York the Rescue will target on September 28, 1990. Defendants keep this aspect of the Rescue secret in order to frustrate attempts to guarantee womens' access to the clinics and providers. Plaintiff PCN organization intends to help protect and guarantee women's access to the facilities during the course of the Rescue, but is frustrated in its attempts to do so by defendants' refusal to identify the targeted facilities.

75. Upon information and belief some if not all of defendant participants in Project Rescue activities plan to attend the D.C. Project II organized in whole or in part by Operation Rescue on November 15-17 in Washington, D.C. Activities planned for the D.C. Project II include a call for "rescuers" to "participate directly in a child saving activity" and a request that " one hundred rescuers in community (to) stay in jail for 45 days."

76. Plans for Operation Rescue were first announced at a Pro-Life Action Network Conference in Atlanta, Georgia in May, 1987. Ever since that time defendants have organized for the Operation and its local supporters in western New York and have distributed flyers inviting others to participate in rescue activities, have staged rallies and other organizing events, and have developed, refined, and utilized blockade and other obstruction techniques at health care facilities providing family planning and abortion services in western New York.

77. Upon information and belief, defendant participants in Project Rescue activities and blockades in western New York act in concert with or are otherwise affiliated with Operation Rescue whose headquarters are located in Binghamton, New

York.

78. Upon information and belief, defendant Rev. James Evans, a resident of Binghamton, New York, and identified with Operation Rescue, was arrested on February 17, 1989 and convicted of trespass and resisting arrest at the medical offices of Dr. Shalom Press, 666 Colvin Avenue, Kenmore, New York.

79. Upon information and belief, defendant Rev. James Evans, a resident of Binghamton, New York, and identified with Operation Rescue, acting in concert with western New York resident Dwight Saunders, Esq., directed a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York.

80. Participating in Project Rescue events, defendants and others acting in concert with them have engaged in numerous previous blockades or acts of harassment, obstruction, or trespass of medical facilities in western New York delivering family planning and abortion services since October, 1988. Each defendant has been arrested and convicted for one or more offenses committed in connection with such blockades or acts of harassment, obstruction or trespass.

81. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for blocking entry into and egress from the medical facilities of Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York on October 29, 1988 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

81. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for blocking entry

into and egress from the medical facilities Dr. Shalom Press, 666 Colvin Avenue, Kenmore, New York on February 17, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

83. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for trespassing which included chaining themselves together inside of the medical facilities of Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York on April 7, 1989 thereby impeding law enforcement and disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

84. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for blocking entry into and egress from the medical facilities of Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York on April 9, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

85. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for blocking entry into and egress from the medical facilities of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York on April 28, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

86. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for blocking entry into and egress from the medical facilities of Erie Medical Center,

50 High Street, Buffalo, New York on August 25, 1989 disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

87. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for harassment at the medical facilities of Erie Medical Center, 50 High Street, Buffalo, New York on September 2, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

88. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for trespass at the medical facilities of Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York on September 16, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

89. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for trespass at the medical facilities of Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York on September 23, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

90. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for trespass and others were arrested and convicted for chaining themselves together in the offices of the medical facilities of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York on October 11, 1989

thereby impeding law enforcement and disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

91. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for blocking entry into and egress from the medical facilities of Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York on October 28, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

92. Project Rescue, and individual defendants, and others acting in concert with them, intend to engage in similar conduct to the conduct described above, on September 28, 1990 and other future dates. Such conduct is intended to and will have the effect of denying or disrupting women's access to the targeted clinics and their right to travel, with the intended result that many women will have to delay their scheduled medical services. Such conduct is intended to and will have the effect of harassing and causing severe emotional distress to women seeking medical services at the targeted facilities. Such conduct is intended to and will have the effect of disrupting and interfering with the business of targeted facilities. Any delay in the provision of health services relating to childbirth and abortion, or in the provision of certain other gynecological services, increases the health risks faced by the women affected. Such conduct is intended to an will have the effect of causing property damage to plaintiff health care providers and causing them to incur additional protective security expenses. Therefore, unless defendants' planned activities are enjoined, substantial and irreparable damage will be done to women patients' health and safety, and to their rights to travel interstate for the purpose of obtaining health care and their rights

to choose an abortion and to carry out that decision, as well as to the plaintiff clinics' rights to conduct their business without illegal interference.

93. Upon information and belief defendant participants in Project Life activities and blockades in western New York act in concert with or are otherwise affiliated with Operation Rescue whose headquarters are located in Binghamton, New York.

94. While participating in a Project Life event, certain of the defendants and others acting in concert with them were arrested and convicted for trespass at the medical facilities of Doctor Morris Wortman, 200 White Spruce Boulevard, Brighton, New York on September 24, 1988 thereby impeding law enforcement and disrupting and preventing the delivery of all health care services to patients at said facility.

95. While participating in a Project Life event, certain of the defendants and others acting in concert with them entered Highland Hospital at 855 South Avenue, Rochester, New York, blockaded the offices of the Highland Obstetrical Group located on the fifth floor of this multiple use health care facility and were arrested in May 1988 and convicted for trespass thereby impeding law enforcement and disrupting and preventing the delivery of many types of health care services.

96. While participating in a Project Life event, certain of the defendants and others acting in concert with them entered Highland Hospital at 855 South Avenue, Rochester, New York, blockaded the offices of the Highland Obstetrical Group located on the fifth floor of his multiple use health care facility and were arrested for trespassing in October 1989.

97. While participating in a Project Life event, blockaders

entered Highland Hospital at 855 South Avenue, Rochester, New York, on October 13, 1990, blockaded the offices of the Highland Obstetrical Group located on the fifth floor of this multiple use health care facility thereby disrupting the delivery of health care services. In this instance, the blockaders were ordered to disperse immediately by the Rochester police shortly after the blockade commenced.

98. While participating in a Project Life event, certain of the defendants and others acting in concert with them were arrested for trespass at the offices of the Alexander Women's Group, 220 Alexander Street, Rochester, New York on April 12,1989 thereby impeding law enforcement and disrupting and preventing the delivery of health care services to patients.

99. While participating in a Project Life event, certain of the defendants and others acting in concert with them were arrested for trespass at the offices of the Alexander Women's Group, 220 Alexander Street, Rochester, New York on April 26, 1989 thereby impeding law enforcement and disrupting and preventing the delivery of health care services to patients.

100. While participating in a Project Life event, certain of the defendants and others acting in concert with them were arrested for trespass at the offices of the Alexander Women's Group, 220 Alexander Street, Rochester, New York on December 1, 1989 thereby impeding law enforcement and disrupting and preventing the delivery of health care services to patients.

101. While participating in a Project Life event, certain of the defendants and others acting in concert with them were arrested for trespass at the offices of the Alexander Women's Group, 220 Alexander Street, Rochester, New York on March 29,

1990 thereby impeding law enforcement and disrupting and preventing the delivery of health care services to patients.

102. Project Life, and individual defendants, and others acting in concert with them, intend to engage in similar conduct to the conduct described above during October 1990 and thereafter in the Rochester area. Such conduct is intended to and will have the effect of denying or disrupting women's access to targeted facilities and their right to travel, with the intended result that many women will have to delay their scheduled medical services. Such conduct is intended to and will have the effect of harassing and causing severe emotional distress to women seeking medical services at the targeted facilities. Such conduct is intended to and will have the effect of disrupting and interfering with the business of the targeted facilities. Any delay in the provision of health services relating to childbirth and abortion, or in the provision of certain other gynecological services, increases the health risks to the women affected. Therefore, unless defendants' planned activities are enjoined, substantial and irreparable damage will be done to women patients ' health and safety, and to their rights to travel interstate for the purpose of obtaining health care and their rights to choose an abortion and to carry out that decision as well as to the plaintiff clinics' rights to conduct their business without illegal interference.

103. Plaintiffs have no adequate remedy at law in that monetary damages cannot fully recompense them for the threats and actual injury to their health and safety resulting from defendants' actions and the consequent delays in receiving or providing necessary medical services.

104. Upon information and belief, law enforcement efforts by the police departments of Buffalo, Kenmore and

Amherst have been ineffective in restoring medical services in a timely manner to patients seeking them at plaintiff providers' facilities.

105. Upon information and belief, the Kenmore police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the facilities of Dr. Shalom Press, 666 Colvin Avenue, Kenmore, New York.

106. Upon information and belief, the Amherst police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the facilities of Dr. Paul Davis, 1404 Millersport Highway, Williamsville, New York.

107. Upon information and belief, the Buffalo police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the facilities of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York.

108. Upon information and belief, the Buffalo police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the facilities of Erie Medical Center, 50 High Street, Buffalo, New York.

109. Upon information and belief, the Buffalo police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the facilities of Buffalo Gyn Womenservices, formerly located at 260 Elmwood Avenue, Buffalo, New York with present offices at 1241 Main Street, Buffalo, New York.

110. Upon information and belief, the failure of the Buffalo Police Department has been the subject of a Buffalo Common Council investigation and hearings and of a request by the Buffalo Common Council to the Federal Bureau of Investigation to conduct an investigation of the manner in which the Buffalo Police Department has handled the numerous blockades of plaintiff providers and facilities within the City of Buffalo.

111. Upon information and belief, the Rochester area police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the facilities of Doctor Morris Wortman, 200 White Spruce Boulevard, Brighton, New York.

112. Upon information and belief, the Rochester area police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the Highland Obstetrical Group, 855 South Avenue, Rochester, New York.

113. Upon information and belief, the Rochester area police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the delivery of services at the Alexander Women's Group, 220 Alexander Street, Rochester, New York.

114. Defendants have conspired together with each other and other parties presently unknown for the purpose of denying women seeking abortions and other family planning services at targeted facilities the equal protection of the laws and the equal privileges and immunities under the law and of obstructing travel, in violation of 42 U.S.C. section 1985(3). Defendants are and continue to be motivated by an invidiously discriminatory

animus directed at women seeking to exercise their constitutional and legal right to choose abortions and other family planning services at the targeted facilities, as well as at all like medical facilities in western New York.

115. No previous application for relief under federal law from the planned activities of organizational and individual defendants has been made in any court.

SECOND CAUSE OF ACTION

(New York Civil Rights Law, Section 40(c) and
New York Executive Law section 296)
(By all Plaintiffs Against all Defendants)

116. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 115 as if fully set forth herein.

117. The actions planned by defendants which are directed at women seeking abortion and other family planning services at the targeted facilities, jointly and individually, violate the laws of New York State, including New York Civil Rights Law, Section 40(c), which prohibits discrimination and harassment in the exercise of civil rights on the basis of sex, and New York Executive Law section 296, which prohibits discrimination in access to and use of public accommodations, including but not limited to health care facilities.

THIRD CAUSE OF ACTION

(Tortious Interference with Business)
(By all Plaintiff Clinics and Doctors
Against all Defendants)

118. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 115 as if fully set forth herein.

119. The actions planned by defendants, jointly and individually, constitute a tortious interference with plaintiffs facilities business.

FOURTH CAUSE OF ACTION

(Trespass)
(By all Plaintiff Clinics and Doctors
Against all Defendants)

120. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 115 as if fully set forth herein.

121. The actions planned by defendants, jointly and individually, constitute a tortious intentional trespass on the targeted clinics and abortion providers.

FIFTH CAUSE OF ACTION

(Intentional Infliction of Emotional Harm)
(By all Plaintiffs Against all Defendants)

122. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 115 as if fully set forth herein.

123. The actions of defendants, jointly and individually, constitute tortious intentional infliction of emotional harm on patients and employees of the plaintiff clinics and abortion providers.

SIXTH CAUSE OF ACTION

(Tortious Harassment)
(By all Plaintiffs Against all Defendants)

124. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 115 as if fully set forth herein.

125. The actions planned by defendants, jointly and individually, constitute tortious harassment of patients and employees of the plaintiff clinics and abortion providers.

SEVENTH CAUSE OF ACTION

(False Imprisonment)
(By all Plaintiffs Against all Defendants)

126. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 115 as if fully set forth herein.

127. The actions planned by defendants, jointly and individually, constitute false imprisonment of patients and employees of the plaintiff clinics and abortion providers.

WHEREFORE, plaintiffS demand judgment, together with costs, fees and disbursements of this action, as follows:

1. Declaring that the planned actions of defendants are violative of plaintiffs' rights to obtain and provide abortions under the United States Constitution and the statutes and common law of New York; and

2. Declaring that the defendants' conduct complained of is violative of the individual women plaintiffs' rights to travel

under the United States Constitution; and

3. Granting plaintiffs a preliminary and permanent injunction restraining and enjoining the defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, in any manner or by any means, from:

(a) trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility at which abortions are performed in western New York, including demonstrating within 15 feet of any person seeking access to or leaving those facilities on September 28, 1990, or the conclusion of a planned blockade called "Project Rescue Western New York," whichever is later;

(b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed in New York, on September 28, 1990, or the conclusion of a planned blockade called "Project Rescue Western New York," whichever is later;

(c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of the clinics;

(d) attempting, or inducing, encouraging, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a), (b), and (c) above; and

4. Providing that nothing in the Court's Order should be construed to limit defendants' exercise of their legitimate First Amendment rights; and

5. Directing the defendant organizations and their officers, and all individual defendants and those acting in concert with them, to instruct all members of the conspiracy and organizations believed to be planning to participate in the activities enumerated above not to engage or participate in any such activities enjoined in paragraphs (a) through (d) above; and

6. Providing that the failure to comply with the Court's order by any organizational or individual defendant or any Project Rescue participant with actual notice of the provisions of the Court's order shall be subject to civil damages of $25,000 per day for any violations of the Court's order; and

7. Awarding compensatory damages in an amount to be determined at trial and punitive damages as warranted; and

8. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

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Dated: Buffalo, New York
November 5, 1990

* Admitted to practice in the District of Columbia

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PRO-CHOICE NETWORK OF
WESTERN NEW YORK, ET AL.,

Plaintiffs,

ANSWER

-vs-

Civil #90-1004A

PROJECT RESCUE WESTERN
NEW YORK, ET AL.,

Defendants.

Defendants, for their answer to plaintiffs' second amended complaint in this action (referred to herein as "the complaint"):

1. Admit the allegations contained in paragraph 4.

2. Deny the allegations contained in paragraphs 1, 2, 3, 67 through 70, 77, 92, 93, 96, 97, 102 through 109, 111 through 115, 117, 119, 121, 123, 125, and 127.

3. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5 through 13, 66, and 110.

4. Answering paragraph 14 of the complaint, defendants deny the allegations as to the purpose and aims of the defendant, Project Rescue, and deny that it has offices in Buffalo, New York, but otherwise admit the allegations of that paragraph.

5. Answering paragraph 15 of the complaint, defendants deny that Operation Rescue has been properly served with process in this action or is a party to this action, deny that they have or have had any affiliation with that organization, deny that Operation Rescue was involved in the planning of any activities in the Buffalo area on any date, and deny first hand or personal knowledge as to the purposes, activities, or continued existence of that organization.

6. Answering paragraph 16 of the complaint, defendants deny the allegations as to the purpose and aim of the defendant, Project Life, deny that Project Life has organized "disruptions" at any time, or any specific activities in October 1990, and otherwise admit the allegations of that paragraph.

7. Answering paragraphs 17 through 20, and 65 of the complaint, defendants deny that the individuals named in those paragraphs are leaders, directors, coordinators, or organizers of the activities and groups described therein, and deny the allegations as to the actions of those defendants. With respect to the allegations in those five paragraphs as to the arrests and/or convictions of those defendants, defendants do not have a certain recollection of the precise dates and places of those arrests, but refer to the official records of the New York State Judicial System; upon information and belief, however, defendants believe that the dates asserted (other than the alleged arrest on September 23, 1989) are correct.

8. Answering paragraphs 21 through 64, 94, 95, and 98 through 101 of the complaint, defendants deny an exact and precise recollection of the dates and places of their arrests and/or convictions, but refer to the official records of the New York State Judicial System with respect to those dates and well as for the precise reasons for their arrests or convictions; upon

information and belief, however, defendants believe that the dates and places asserted in those paragraphs are accurate. Defendants admit the allegations as to their places of residence in those paragraphs, but deny all other allegations contained in those paragraphs.

9. Answering paragraphs 71 through 73 of the complaint, defendants refer to the specified pamphlets and publications with respect to their contents, deny that any such activities transpired on September 28, 1990, and deny that any present plans exist for any such activities.

10. Answering paragraph 74 of the complaint, defendants deny knowledge and information as to the intentions of the plaintiff, and otherwise deny the allegations of that paragraph.

11. Answering paragraph 75 of the complaint, defendants deny that they have any such present intention, or knowledge of any such present plans.

12. Answering paragraph 76 of the complaint, defendants deny knowledge and information sufficient to permit them to admit or deny the first sentence of that paragraph, and otherwise deny the allegations of that paragraph.

13. Answering paragraphs 78 and 79 of the complaint, defendants deny that Rev. James Evans is identified with Operation Rescue, deny the allegations as to his supposed actions, and refer to the criminal records of the New York State Judicial System as to the exact dates and places of his arrests and/or convictions; upon information and belief, however, defendants believe that the dates asserted are correct.

14. Answering paragraph 80 of the complaint, defendants

admit that each individual defendant has been arrested or convicted for one or more offenses, on the basis of charges which are a matter of public record, but deny that there have been "numerous blockades" and deny that any of the defendants have committed any acts of harassment or obstruction, and otherwise deny the allegations of that paragraph.

15. Answering paragraphs 81 through 91 of the complaint, defendants admit that arrests were made at the specified dates and places (with the exception of September 23, 1989), admit that certain convictions followed for reasons that are a matter of public record, deny that all of the specified arrests constituted "Project Rescue events," and deny each and every allegation concerning the supposed effects and impact of those supposed actions and arrests.

16. Answering paragraphs 116, 118, 120, 122, 124, and 126 of the complaint, defendants repeat and reallege their answers to the preceding paragraphs incorporated by reference therein.

17. Defendants deny each and every other allegation of the complaint not herein specifically admitted or otherwise denied.

FIRST AFFIRMATIVE DEFENSE

18. Some or all of the causes of action in the complaint fail to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

19. Some or all of the claims in the complaint are barred by the applicable statutes of limitations.

THIRD AFFIRMATIVE DEFENSE

20. Some or all of plaintiffs' claims are barred by the doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

21. Some or all of plaintiffs' claims are barred by the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE

22. Because of the pendency of similar, if not identical, actions in the Courts of New York State, both in Erie County and Monroe County, dismissal of this complaint is required and proper under the abstention doctrine.

SIXTH AFFIRMATIVE DEFENSE

23. Some or all of plaintiffs' claims are barred by the full faith and credit clause of the Constitution, as well as 28 U.S.C. § 1738, as well as the doctrines of res judicata and collateral estoppel, by virtue of the decisions and orders already rendered by State Court Justices in other related cases.

SEVENTH AFFIRMATIVE DEFENSE

24. Some or all of the claims in the complaint are barred by the doctrines of license and waiver.

EIGHTH AFFIRMATIVE DEFENSE

25. Some or all of the relief requested by plaintiffs is inconsistent with the defendants' constitutional rights to freedom

of speech, freedom of religion. and freedom of assembly as guaranteed by the First Amendment to the United States Constitution.

NINTH AFFIRMATIVE DEFENSE

26. Upon information and belief, at least some of defendants have been improperly served with process, or with insufficient process.

TENTH AFFIRMATIVE DEFENSE

27. Plaintiffs lack adequate standing to request at least some of the relief requested in their complaint.

ELEVENTH AFFIRMATIVE DEFENSE

28. Plaintiffs cannot demonstrate the required equitable grounds for all of the injunctive relief sought by them in this action, including but not limited to a genuine possibility of irreparable injury and the absence of an adequate remedy at law.

TWELFTH AFFIRMATIVE DEFENSE

29. Upon information and belief, some or all of the actions described in the complaint were justified under the doctrines of duress or necessity.

THIRTEENTH AFFIRMATIVE DEFENSE

30. Injunctive and other equitable relief are not authorized by 42 U.S.C. § 1985, which only provides a remedy in damages.

WHEREFORE, defendants request judgment dismissing the complaint, and awarding them reasonable costs and attorney's fees, along with such other relief as seems just and proper to this Court.

DATED: Buffalo, New York
February 26, 1991

/s/ James J. Duane

James J. Duane, Esq.
Attorney for Defendants
CONNORS & VILARDO
42 Delaware Avenue, Suite 710
Buffalo, New York 14202
(716) 852-5533

NOTATION

The Third Amended Complaint (dkt. 72) is identical to the Second Amended Complaint except for the address of one plaintiff.

The answer to the Third Amended Complaint (dkt. 96) simply adopts the answer to the Second Amended Complaint.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PRO-CHOICE NETWORK OF WESTERN NEW YORK; BUFFALO GYN WOMENSERVICES, P.C.; ERIE MEDICAL CENTER; PAUL J. DAVIS, M.D., P.C.; SHALOM PRESS, M.D.; BARNETT SLEPIAN, M.D.; MORRIS WORTMAN, M.D.; HIGHLAND OBSTETRICAL GROUP; ALEXANDER WOMEN'S GROUP,

Plaintiffs,

v.

DECISION AND ORDER
90-CV-1004A

PROJECT RESCUE WESTERN NEW YORK; OPERATION RESCUE; PROJECT LIFE OF ROCHESTER; REV. PAUL SCHENCK; REV. JAMES L. EVANS; REV. TED CADWALLADER; DWIGHT SAUNDERS; DAVID ANDERSON; JEFFREY BARAN; BRIAN BAYLEY; BONNIE BEHN; RONALD BREYMEIER; GILBERT CERTO; SCOTT CHADSEY; KIM DAY; CONSTANCE DEBO; MARK DENT; WAYNE DENT; PAUL DIEMERT; JOAN GIANGRECO; DELORES GLASER; CARMELINA GOLBA, KEVIN GOLBA; LINDA HALL; NANCY HALL; THOMAS HALL; REV. DANIEL HAMLIN; JAMES

HANDYSIDE; PAMELA HUFFNAGLE; DONNA JOHANNS; ERIC JOHNS; NEAL KOCHIS; PAULETTE LIKOUDIS; CHARGES MCGUIRE; CHRISTOPHER MORROW; ANNEMARIE NICE; NICHOLAS PUKALO; CARLA RAINERO; THOMAS RILEY; PATRICIA OSTRANDER; LINDA ROSS; DAVID SMITH; LINDA SMITH; MARK STERLACE; JOYCE STRIGEL; JOHN THOMANN; JOHN TOMASELLO; PAUL WALDMILLER, JR; NANCY WALKER; LEONARD WINTER; HORACE WOLCOTT; GERALD CRAWFORD; DAVID LONG; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

Defendants.

INTRODUCTION

Plaintiffs have petitioned for civil contempt claiming that, on November 29, December 1 and December 8, 1990, defendant Nancy Walker violated the provisions of this Court's temporary restraining order ("TRO") dated September 27, 1990. Plaintiffs seek compensatory and coercive civil contempt sanctions to remedy the loss they suffered as a result of the

alleged violations, and to coerce Walker into conforming her behavior to the terms of the TRO in the future. An evidentiary hearing on plaintiffs' petitions was held over the course of several days from February 6, 1991 to February 14, 1991. The parties were then given an opportunity to brief and argue their respective positions.

After considering the evidence adduced at the hearing, reviewing the submissions of the parties, and hearing argument from counsel, the Court grants plaintiffs' petition for civil contempt with regard to the violations that occurred on November 29 and December 1, 1990. With regard to the violations alleged to have occurred on December 8, 1990, the Court denies plaintiffs' petition. The following constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

BACKGROUND

Plaintiffs Buffalo GYN Womenservices, Erie Medical Center, Paul Davis M.D., Shalom Press M.D., Barnett Slepian M.D., Highland Obstetrical Group, and Alexander Women's Group are health care providers located in the Western New York area. They offer family planning services, abortion services and gynecological services at their health care facilities. Plaintiff Pro-Choice Network of Western New York is a not-for-profit corporation based in Buffalo, New York. It is dedicated to maintaining legal and safe access to family planning and abortion services in the Western New York area. It also provides individuals to serve as escorts for patients seeking access to the plaintiff health care providers' facilities.

Defendants in the main action include three organizations, Project Rescue Western New York, Operation

Rescue and Project Life of Rochester, and 50 individuals, including Nancy Walker. They are opposed to abortion and dedicated to the "pro-life" movement. Plaintiffs allege that defendants have been engaged in a consistent pattern of illegal conduct at plaintiffs' health care facilities including blockading access to and egress from their facilities, trespassing, and harassment and intimidation of their patients and staff.

Plaintiffs commenced the main action on September 24, 1990. Immediately upon filing their complaint, plaintiffs moved for a TRO, pursuant to Fed. R. Civ. P. 65(b), to enjoin a "blockade" that defendants had announced for September 28, 1990. The location of the "blockade" was to be kept secret until the morning it was scheduled to occur. On September 26, 1990, the Court conducted a hearing and heard argument on the TRO motion. On September 27, 1990, after hearing further argument from plaintiffs' counsel and some of the named defendants, and after reviewing the complaint and supporting affidavits, the Court, following New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990), issued a TRO (a copy of which is attached hereto as an appendix to the Decision and Order) enjoining defendants from conducting any blockade of plaintiffs' abortion facilities and from harassing patients and staff entering or exiting the facilities.

Defendants complied with the TRO by holding a peaceful demonstration, rather than a full-fledged blockade, on September 28, 1990. The Court then scheduled a hearing for October 4, 1990, in order to determine whether the TRO should be converted into a preliminary injunction pursuant to Rule 65. At the October 4, 1991 hearing, plaintiffs established service on nearly all defendants, including Nancy Walker, and James Duane, Esq. appeared on behalf of defendants. Defendants then moved to

either dismiss or stay the action pursuant to the abstention doctrine. In a Decision and Order dated October 29, 1990, the Court denied defendants' motion to dismiss or stay the case. In an Order dated November 2, 1990, the Court, with defendants' consent, ordered that the TRO would remain in effect until the motion for a preliminary injunction was decided.[1]

On December 6, 1990, plaintiffs filed a petition for contempt against defendant Nancy Walker, alleging that she violated the TRO on November 29 and December 1. On December 14, 1990, plaintiffs filed another petition for contempt against Walker alleging that she violated the TRO on December 8, 1990. As stated earlier, a hearing was held over the course of several days from February 6, 1991 to February 14, 1991. Plaintiffs called as witnesses Lisa Baker, Ruth Harvey, Paul J. Davis, Elizabeth Sholes, Linda Orlowski, Christine Smith, Marilyn Buckham, Cathleen McGuire, Deborah Warnes and Antoinette Schruefer. Walker called as witnesses Mary Anne Romanowski, Bonnie Behn, Vicky Olczak, Michael Prestia and Sandra Jerge. Walker also testified. Following the hearing, the parties were given the opportunity to brief and argue their respective positions.

FINDINGS OF FACT

I. November 29, 1990

During the morning of November 29, 1990, Nancy Walker was located outside of the health care facility of plaintiff Paul Davis, M.D. at 1404 Millersport Highway, Amherst, New

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[1] The motion for a preliminary injunction was granted on February 14, 1992.

York. She was there as part of a "rescue" demonstration offering "sidewalk counseling" to women entering the clinic. Abortions are performed at Dr. Davis' clinic and it was Walker's intention to dissuade women entering the clinic from having abortions.

At about 9:50 a.m., Lisa Baker and two unidentified friends, one of whom had an appointment with Dr. Davis, drove their automobile into the parking lot of the plaza in which Dr. Davis' clinic is located. As soon as they parked their vehicle, they were approached by Walker along with one other "sidewalk counselor" and a woman holding a video camera. Walker and her cohorts crowded around the vehicle and made it difficult for Baker and her companions to exit therefrom. They also started to communicate with the occupants of the vehicle in a loud and threatening manner. Even after Baker and her companions managed to exit the vehicle, Walker, her fellow "sidewalk counselor," and the cameraperson continued to crowd them and invade their personal space. As Baker and the other two women tried to make their way toward the clinic, Walker followed them closely and continued to deliver her message in a loud and threatening manner. She kept telling them that "abortion is murder, you'll go to hell, we can help you, don't go in there." Walker also attempted to force literature into the hands of Baker and her friends. As Baker and her companions continued toward the clinic, Walker became frustrated and began to yell at them.

Confronted with Walker's loud and invasive behavior, Baker and her friends repeatedly asked Walker to leave them alone. None of the three women showed any interest in Walker's message and kept trying to walk away. Their efforts, however, were futile. Walker ignored the requests and continued to follow, crowd and yell at the three women. Walker's conduct impeded and hindered Baker and her companions' access to the clinic. A walk through the parking lot that normally would have taken

one minute took several minutes. Baker testified that Walker's conduct made her feel scared, angry and upset–like she was "in the middle of a lynch mob." Walker continued to pursue the women all the way up to the sidewalk abutting the front entrance of Dr. Davis' clinic. At that point Walker was approximately four feet away from the entrance of the clinic. She continued to yell at the women even after they entered the clinic and her voice was loud enough to be heard through the clinic doors.

Baker testified that the encounter was particularly distressing due to the presence of the video camera. As Baker and her companions drove into the parking lot, they observed that the woman with the camera, later identified as Bonnie Behn, was videotaping their vehicle and the vehicle's license plate. Further, during the entire encounter between Walker and the three women seeking access to the clinic, Behn kept pointing the video camera into the faces of the women for no other apparent reason than to threaten them with the prospect that their identities may be revealed.

It is undisputed that the plaza complex at 1204 Millersport Highway is private property, with commercial access to tenants and patrons of the plaza. The entire premises, including the parking lot, are clearly marked as private property. The parking lot is surrounded by "Private Property - No Trespassing" signs that were placed there by the owner and there is a sign posted, with the owner's permission, near the entrance to Dr. Davis' clinic that prohibits trespassing, soliciting, demonstrating and pamphleteering anywhere on the premises. By her own admission, on November 29, 1990, Walker went onto the parking lot at 1204 Millersport Highway for the sole purpose of "sidewalk counseling." She was not there to patronize any of the businesses and she did not have the express permission of the owner to enter thereon for any other reason.

In weighing the credibility of the witnesses at the hearing, the Court notes that Lisa Baker, who had absolutely no reason or motive to dissemble, was a wholly credible witness. Her testimony was corroborated by Ruth Harvey, a volunteer patient escort who witnessed the events of that day and, in several aspects, by Walker herself. The testimony of defense witnesses, on the other hand, was so riddled with inconsistencies, both internal to their own testimony and compared to that of other defense witnesses, or so marked by suspiciously selective memory that, for the most part, it is inherently incredible.

II. December 1, 1990

On the morning of December 1, 1990, Nancy Walker was located outside the Buffalo GYN Womenservices' clinic at 1241 Main Street, Buffalo, New York. She was there as part of a "rescue" demonstration offering "sidewalk counseling" to women entering the clinic. Abortions are performed at the Buffalo GYN Womenservices' Clinic and it was Walker's intention to try to dissuade women entering the clinic from having abortions. At approximately 9:05 a.m., an automobile with Pennsylvania license plates stopped at the traffic light located at the intersection of Main and Northhampton Streets. Walker testified that she assumed that at least one of the occupants was going to the clinic for an abortion since the automobile had out-of-state license plates.

Walker approached the vehicle as it waited at the light and began to talk to the occupants through the driver's side window. When the light changed, the vehicle turned right and headed north on Main Street away from the clinic. It then went one block north and pulled over to the curb. Walker pursued the car and as she approached it, two women emerged and started walking down the street toward the clinic. Walker hurried

toward them and started to importune them in a loud and threatening manner. She tried to force literature upon them even though they refused. Walker continued to yell at the women and to follow closely behind them as they made their way toward the clinic. She crowded the women and invaded their personal space. Even when the women asked her to leave them alone, she continued to importune them. Walker pursued the two women for an entire city block. One of the women broke down into tears and started to sob. Walker followed the women all the way up to the clinic entrance.[2]

At the hearing, Walker produced a videotape of certain portions of the December 1, 1990 incident. While the tape was admitted into evidence, the Court has given the tape little weight in its decision. The cameraman, Michael Prestia, selectively taped only those events that he thought important. At critical moments when contemptuous conduct is alleged to have occurred, the camera was either turned off or pointed at the ground. Prestia testified that the reasons for these omissions were because he was blocked by "pro-choice" escorts or because he wanted to save his battery. Had the camera been in the hands of an unbiased third-party, the Court might find these explanations credible. However, in this case, the camera was being operated by Prestia, who is a "pro-life" activist. The Court finds Prestia to be a biased and incredible witness. His testimony was often inconsistent and evasive. Thus, in view of the circumstances, the Court can only conclude that Prestia purposely turned the camera off or pointed it at the ground whenever he felt that it might capture Walker

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[2] Plaintiffs also allege that there was a second incident on December 1, 1990 that involved Walker and two women and a man seeking access to the clinic. However, there was little evidence adduced at the hearing concerning this incident. Thus, the Court has not considered the second incident in its decision.

violating the TRO.

Several patient escorts gave uncontradicted testimony that for the initial few weeks after the TRO was in place, Walker and her cohorts altered their behavior by "sidewalk counseling" in a quiet, nonthreatening manner, and by ceasing their counseling when requested to do so. However, once the immediate threat of sanctions dissipated, Walker went right back to the unlawful conduct that warranted the TRO in the first place, i.e., she "counseled" women seeking entrance to the clinics in a loud and threatening manner and continued to do so even after being asked to cease and desist. This uncontradicted testimony clearly demonstrates that Walker knew how to comply with the TRO but eventually chose not to.

Further evidence of Walker's lack of regard for the Court's TRO is found in defendants' videotape of the December 1, 1990 incident. At one point, Walker is shown screaming into the camera: "I don't care if Arcara puts me in ja . . . ." Suddenly, the camera is shut off. The word cut off is obviously "jail." This footage demonstrates that Walker was aware that she was violating the TRO.

III. December 8, 1990

On the morning of December 8, 1990, Walker was once again engaged in "sidewalk counseling" activities in front of the clinic at 1241 Main Street. At approximately 7:55 a.m., she encountered a young man and woman seeking access to the clinic. She walked up to them and began communicating with them. The man and woman kept walking down the sidewalk toward the clinic entrance. Walker continued to follow the couple and to communicate her message. Walker's tone of voice was much more subdued than during the incidents on November 29 and

December 1, 1990. She was not yelling and did not block or impede the man and woman from entering the clinic. Moreover, it is unclear from the evidence adduced at the hearing whether the couple ever manifested their desire for Walker to leave them alone in such away that Walker could have reasonably been expected to understand and comply with such a request.

As with the December 1, 1990 incident, Walker produced a videotape portraying certain portions of the incident on December 8, 1990. For the same reasons regarding the December 1, 1990 videotape, the Court has given the December 8, 1990 tape little weight in its decision.

CONCLUSIONS OF LAW

I. Standing

In Terry, the Second Circuit held that health care providers have independent standing to assert the rights of their patients to travel freely and to obtain abortion services. The court reasoned that a patient's "enjoyment of those rights is `inextricably bound up with the activity the litigant wishes to pursue,'" and thus, the court could be "assured that the clinics represent the rights and interests of the women seeking their assistance." Id. at 1348. The Terry court also held that "pro-choice" organizations had standing as representatives of their membership. Id. at 1349. Thus, plaintiffs have standing to enforce the Court's TRO.

II. Civil Or Criminal Contempt

Walker claims that the requested contempt sanctions are criminal in nature and she must therefore be afforded all the constitutional protections associated with a criminal proceeding

before she can be held in contempt of the Court's TRO. See Hicks v. Feiock, 485 U.S. 624 (1988) ("[C]riminal penalties may not be imposed on someone who has not been afforded the protection that the Constitution requires of such criminal proceedings..."). The Court finds this argument without merit.

An individual who fails to obey a valid court order is subject to both civil and criminal contempt penalties for the same acts. United States v. Petito, 671 F.2d 68, 72 (2d Cir.), cert. denied, 459 U.S. 824 (1982). The general principles distinguishing civil and criminal contempt are well established.

> The two species of contempt are distinguished by determining the purpose for which the sanction [is] imposed. A sanction imposed to compel obedience to a lawful court order or to provide compensation to a complaining party is civil. A sanction imposed to punish for an offense against the public and to vindicate the authority of the court, that is, not to provide private benefits or relief, is criminal in nature.

Terry, 886 F.2d at 1350-51 (citations omitted). Thus, civil contempt sanctions serve two purposes: (1) to coerce future compliance with the court's order; and (2) to compensate the complainant for losses stemming from noncompliance. New York State NOW v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988) (citations omitted). In many similar cases brought in other federal courts, including the Second Circuit, against anti-abortion protestors, the courts have had the opportunity to discuss the difference between civil and criminal contempt, and have uniformly concluded that contempt sanctions of the type sought here against Walker are civil in nature. New York State NOW v. Terry, No. 90-6187, slip op. at 9198 (2d Cir. Apr. 13, 1992); Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990); Portland

Feminist Women's Health Center v. Advocates for Life Inc., 887 F.2d 787 (9th Cir. 1989); Terry, 697 F. Supp. at 1329-30; 886 F.2d at 1350-51.

Walker argues that the instant proceedings necessarily involve imposition of criminal contempt sanctions. The crux of her argument is that because these proceedings are occurring after the conclusion of the conduct complained of, she has no opportunity to cure her contempt and any sanction imposed is therefore punitive in nature.

It is abundantly clear, however, that the present contempt proceedings are civil, rather than criminal, in nature. These contempt proceedings were initiated by plaintiffs, not by the Court or the government. Further, plaintiffs seek only to enforce their rights under the TRO and to remedy the harm caused by Walker's past violations. The proceedings seek the imposition of conditional and coercive fines in amounts clearly specified in the TRO itself. The condition can be avoided by compliance and the coercive nature of the fine derives from its encouragement of future compliance. It is undisputed that Walker was on notice of the TRO and the penalties she would face for noncompliance. Thus, she violated the TRO at her own peril and must be sanctioned in order to coerce her future compliance.

III. Collateral Attack

Walker, in arguing against the imposition of contempt sanctions, raises several challenges to the propriety of the Court's TRO. She argues that: (1) the "cease and desist" language in the TRO violates her First Amendment right to freedom of speech and is therefore unconstitutional; (2) the "tortious harassment" language is unconstitutionally vague and overbroad; and (3) the TRO is legally invalid because plaintiffs never showed a threat of

irreparable harm. The Court finds, however, that the collateral bar rule precludes Walker from challenging the validity of the underlying TRO as a defense against the imposition of contempt sanctions.

The collateral bar rule is longstanding and its purpose is clear.

> If a party can make himself a judge of the validity of orders that have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). "The orderly and expeditious administration of justice requires that an order issued by a court with jurisdiction over the subject matter and the person must be obeyed by the parties until it is reversed by orderly and proper proceedings.'" Maness v. Meyers, 419 U.S. 449, 459 (1975) (quoting United States v. United Mine Workers, 330 U.S. 258, 293 (1947)). "A `contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.'" Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 441 n.21 (1986) (quoting Maggio v. Zeitz, 333 U.S. 56 (1948)).

The Supreme Court has applied the collateral bar rule even when the underlying injunction may tread upon important First Amendment rights. In Walker v. City of Birmingham, 388 U.S. 307 (1967), the Court ruled that civil rights protestors, who were charged with contempt for marching in Birmingham without a parade permit in violation of a state court's temporary

injunction, could not litigate the validity of the order in the contempt proceedings. The Court reached this conclusion despite serious reservations about the constitutionality of the underlying order. Id. at 317. The Court explained that:

> [N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

Id. at 320-21.

In the instant case, the Court has jurisdiction over the parties and the subject matter.[3] The Court finds that its TRO is not transparently invalid, but rather was carefully crafted to protect Walker's First Amendment rights. The TRO was in effect for two months prior to Walker's first violation and throughout that entire period neither Walker nor any of the other defendants moved to modify or vacate the TRO. In fact, Walker and the other defendants, through their attorney, consented to the extension of the TRO until the Court decided plaintiffs' motion for a preliminary injunction. Had defendants refused to consent to the extension of the TRO, the Court would have been faced

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[3] The defendants did make a motion to dismiss the case based on the abstention doctrine. However, in a Decision and Order dated October 29, 1990, the Court denied the motion.

with the option of: (1) letting the TRO expire in accordance with Fed. R. Civ. P. 65(b); or (2) immediately converting the TRO into a preliminary injunction thereby making it an appealable order. Thus, Walker had ample opportunity to challenge the validity of the TRO directly before this Court and before the Second Circuit Court of Appeals, rather than through a contempt proceeding. Instead, she chose to consent to an extension of the TRO.

IV. Civil Contempt Standard

A court can hold a party in civil contempt only when: (1) the order that the party allegedly failed to comply with is clear and unambiguous; (2) the proof of noncompliance is "clear and convincing"; and (3) the party has not been reasonably diligent and energetic in attempting to comply with the order. EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, 925 F.2d 588, 594 (2d Cir. 1991); Terry, 886 F.2d at 1351. It is not necessary for the plaintiff to prove that the defendant willfully disobeyed the order. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Donovan v. Sovereign Sec. Ltd., 726 F.2d 55, 59 (2d Cir. 1984). After applying this standard to the instant case, the Court finds that Walker was in civil contempt of the TRO on November 29 and December 1, 1990, but was not in contempt on December 8, 1990.

A. The Order is Clear and Unambiguous

Fed. R. Civ. P. 65(d), requires that injunctions be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." The Rule was intended to prevent an uncertain or vague decree from becoming the basis for a contempt citation. See Schmidt v. Lessard, 414 U.S. 473 (1974). To comply with the specificity and clarity requirements of Rule

65, an injunction must be specific and definite enough to give a person of ordinary intelligence fair notice of what conduct is prohibited. Terry, 886 F.2d at 1352 (citing In re Baldwin-United Corp., 770 F.2d 328, 339 (2d Cir. 1985)); cf. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

The Court finds that the conduct that lay between that which was prohibited and that which was permitted under the proscriptions of the TRO was sufficiently clear for Walker to ascertain precisely what she could and could not do. Thus, the TRO is sufficient to serve as a foundation for a contempt citation.

B. Proof of Noncompliance

Civil contempt petitions require proof by "clear and convincing evidence." Terry, 886 F.2d at 1352; Securities & Exch. Comm'n v. American Bd. of Trade, 830 F.2d 431 (2d Cir. 1987), cert. denied, 485 U.S. 938 (1988). "Clear and convincing evidence" is an intermediate standard of proof that is beyond a "preponderance of the evidence" standard, but not as stringent as "beyond a reasonable doubt." Addington v. Texas, 441 U.S. 418, 424 (1978). This standard is appropriate for the protection of "particularly important individual interests" that nevertheless do not implicate the fundamental liberty interests found in criminal cases. Id. The "clear and convincing evidence" standard is met by evidence that produces in the mind of the trier of fact "an abiding conviction that the truth of [the] factual contentions are 'highly probable.'" Colorado v. New Mexico, 467 U.S. 310, 316 (1983).

1. November 29, 1990

Plaintiffs have presented "clear and convincing evidence" that Walker's conduct on November 29, 1990 violated several

provisions of the TRO. First, Walker trespassed on the facility of plaintiff Paul Davis, M.D. at 1404 Millersport Highway, Amherst, New York, for the sole purpose of tortiously harassing three individuals who were seeking access to Dr. Davis' clinic. Second, she proceeded to follow these people throughout the parking lot, harassing them all the while. Third, she refused to cease and desist from such conduct despite being asked to do so at least four or five times. Finally, Walker followed the women right up to the curb of the sidewalk adjacent to the front entrance of the clinic well within the fifteen feet "clear zone" provided in the TRO. Accordingly, the Court finds that Walker violated the TRO on November 29, 1990.

2. December 1, 1990

Here again there is "clear and convincing evidence" that Walker violated the TRO. On December 1, 1990, Walker approached two women who were seeking access to the Buffalo GYN Womenservices' clinic at 1241 Main Street, Buffalo, New York. She pursued these two women for an entire city block, harassing them all the while. She yelled at them, crowded them, invaded their personal space, and impeded and hindered them from entering the clinic. Further, she failed to cease and desist from this conduct despite repeatedly being asked to do so by the two women. Walker followed the women all the way up to the clinic entrance, and continued to yell at them even after they entered therein. Accordingly, the Court finds that plaintiffs have established by "clear and convincing evidence" that Walker violated the TRO on December 1, 1990.

3. December 8, 1990

With regard to the last incident on December 8, 1990, the Court finds that plaintiffs have failed to meet their burden of

proving Walker's noncompliance by "clear and convincing evidence." Walker's conduct was much more subdued on that occasion than it was on November 29 and December 1, 1990. She did not yell at the two people seeking access to the clinic nor did she crowd or hinder them in any way. Plaintiffs allege that Walker failed to cease and desist from communicating her message to the two people despite their request that she do so. It is not clear, however, whether the people manifested their desire to be left alone in such a way that Walker could have reasonably been expected to understand and comply with that desire. While it is not necessary under the TRO for people entering plaintiffs' clinics to express verbally their desire to be left alone, there must be some manifestation of that desire before defendants are required to cease and desist from communicating their message. Here, plaintiffs have failed to establish by "clear and convincing evidence" that the two people entering the clinic on December 8, 1990, manifested their desire to be left alone.[4]

C. Reasonable Diligence

The Court finds that Walker was not reasonably diligent and energetic in attempting to achieve compliance with the TRO. Several patient escorts gave uncontradicted testimony that for the initial few weeks after the TRO was in place, Walker and her associates altered their behavior by "sidewalk counseling" in a quiet, nonthreatening manner, and by ceasing their counseling when requested to do so. However, once the immediate threat of sanctions dissipated, Walker went right back to the unlawful conduct that warranted the TRO in the first place. This

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[4] With regard to this incident, plaintiffs might well have established Walker's noncompliance by a "preponderance of the evidence." However, they have failed to meet the more stringent standard of "clear and convincing evidence."

uncontradicted testimony clearly demonstrates that Walker knew how to comply with the TRO but eventually chose not to.

As stated earlier, further evidence of Walker's lack of regard for the Court's TRO is found in defendants' videotape of the December 1, 1990 incident. At one point, Walker is shown screaming into the camera: "I don't care if Arcara puts me in ja . . . ." Suddenly, the camera is shut off. The word cut off is obviously "jail." This footage demonstrates that Walker was aware that she was violating the TRO. While it is clear that Walker was frustrated by the proscriptions contained in the TRO, her frustration does not excuse her conduct.

V. Amount and Disposition of Sanctions

When imposing civil contempt sanctions for the purpose of coercing compliance with a court order, a court should consider: (1) the character and magnitude of the harm threatened by continued contempt; (2) the probable effectiveness of the proposed sanctions; and (3) the financial consequences of the sanction on the contemnor and the consequent seriousness of the burden of the sanction upon him. Terry, 697 F. Supp. at 1332-33; 886 F.2d at 1353. "The ultimate consideration is whether the coercive sanction–here, a fine–is reasonable in relation to the facts." Terry, 886 F.2d at 1353 (citations omitted).

The TRO provides that failure to comply will subject the contemnor to civil damages of $10,000 per day for the first violation. The TRO further provides that for successive violations, the contemnor will be subject to a civil contempt fine double that of the previous fines. Thus, in this case, Walker faces a total sanction of $30,000–$10,000 damages for the violation on November 29, 1990 and a $20,000 fine for the violation on December 1, 1990.

The Court finds that the character and magnitude of the harm threatened by Walker's continued contumacy is such that a substantial sanction is appropriate. Walker's continued harassment of women seeking medical services at plaintiffs' clinics could cause them to delay or forego obtaining health care thereby increasing the medical risks associated with such care. Further, Walker's persistence in violating the TRO may be emulated by other defendants and "pro-life" activists unless she is sanctioned for her unlawful conduct.

However, while a substantial sanction is appropriate, the Court must also take into account the financial burden to Walker when determining the amount of the sanction. Walker established at the hearing that she has limited financial resources. Thus, the Court will impose an "immediate" sanction of $10,000 and will make payment of the remaining $20,000 contingent on future violations of the Preliminary Injunction.

The $10,000 shall be paid to plaintiffs and divided evenly between Dr. Davis and Buffalo GYN Womenservices. These plaintiff health care facilities have made an uncontested showing of cognizable injuries to their operations resulting directly from Walker's unlawful conduct.

They have shown both actual injury, in the form of disrupted daily operations, patients rendered upset and distressed and increased stress to their staffs, and compensable loss, consisting of the cost of extra security measures and additional staff. Given this showing of actual injury and compensable loss, the Court finds that it is appropriate to award $10,000 to the two plaintiff health care clinics that were the target of Walker's unlawful conduct. See New York v. Shore Realty Corp., 763 F.2d 49, 54 (2d Cir. 1985); Vuitton v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979).

In addition to the contempt sanction, plaintiffs also seek all costs and attorneys' fees associated with enforcing the Court's TRO. The TRO clearly states that a contemnor is liable "for all attorneys' fees and related costs incurred by plaintiffs in relation to the enforcement of this Order." In addition, it is well established that a successful complainant in a contempt proceeding is entitled to the reasonable costs of prosecuting the contempt, including attorneys' fees, if the violation of the court's order is found to have been wilful. Canterbury Belts, Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 39 (2d Cir.1989); Vuitton, 592 F.2d at 130.

In this case, the Court finds that Walker's violation of the TRO was wilful. Even though the TRO clearly and unambiguously spelled out the prohibited activity, Walker continued to trespass on private property, harass patients and staff and impede access to the clinics. Evidence of Walker's wilfulness is found in the videotape of the December 1, 1990 incident. As stated earlier, at one point in the videotape, Walker is shown screaming into the camera: "I don't care if Arcara puts me in ja . . . ." This footage clearly demonstrates that Walker was aware that she was violating the TRO. Thus, because Walker's violations of the TRO on November 29 and December 1, 1990 were wilful, the plaintiffs are entitled to all reasonable costs associated with enforcing the TRO, including attorneys' fees.[5]

CONCLUSION

For the reasons stated, the Court grants the plaintiffs'

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[5] Plaintiffs are not entitled to costs and attorneys' fees for the December 8, 1990 incident since they failed to prove there was a violation on that date.

petitions for civil contempt against Nancy Walker with regard to the violations occurring on November 29 and December 1, 1990. As a sanction for these violations, the Court imposes $10,000 civil damages and a $20,000 fine for a total of $30,000. The Clerk of the Court shall immediately enter judgment against Walker in the amount of $10,000. These funds are to be paid to plaintiffs Paul Davis, M.D. and Buffalo GYN Womenservices in accordance with this Decision and Order. Payment of the remaining $20,000 is contingent on any future violations of the Preliminary Injunction. In addition, the Court grants plaintiffs' request for reasonable attorneys' fees and costs with regard to the violations occurring on November 29 and December 1, 1990. Plaintiffs shall file an affidavit of all attorneys' fees and costs by August 14, 1992. Walker shall have until August 31, 1992 to respond. Finally, the Court denies the plaintiffs' petition for civil contempt with regard to the violations alleged to have occurred on December 8, 1990.

It is so ordered.

/s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

Dated: July 24, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PRO-CHOICE NETWORK OF WESTERN NEW YORK; BUFFALO GYN WOMENSERVICES, P.C.; ERIE MEDICAL CENTER; PAUL J. DAVIS, M.D., P.C.; SHALOM PRESS, M.D.; BARNETT SLEPIAN, M.D.; MORRIS WORTMAN, M.D.; HIGHLAND OBSTETRICAL GROUP; ALEXANDER WOMEN'S GROUP,

Plaintiffs,

v.

DECISION AND ORDER 90-CV-1004A

PROJECT RESCUE WESTERN NEW YORK; OPERATION RESCUE; PROJECT LIFE OF ROCHESTER; REV. PAUL SCHENCK; REV. JAMES L. EVANS; REV. TED CADWALLADER; DWIGHT SAUNDERS; DAVID ANDERSON; JEFFREY BARAN; BRIAN BAYLEY; BONNIE BEHN; RONALD BREYMEIER; GILBERT CERTO; SCOTT CHADSEY; KIM DAY; CONSTANCE DEBO; MARK DENT; WAYNE DENT; PAUL DIEMERT; JOAN GIANGRECO; DELORES GLASER; CARMELINA GOLBA, KEVIN GOLBA; LINDA HALL; NANCY HALL; THOMAS HALL; REV. DANIEL HAMLIN; JAMES HANDYSIDE; PAMELA HUFFNAGLE; DONNA JOHANNS; ERIC JOHNS;

NEAL KOCHIS; PAULETTE LIKOUDIS; CHARGES MCGUIRE; CHRISTOPHER MORROW; ANNEMARIE NICE; NICHOLAS PUKALO; CARLA RAINERO; THOMAS RILEY; PATRICIA OSTRANDER; LINDA ROSS; DAVID SMITH; LINDA SMITH; MARK STERLACE; JOYCE STRIGEL; JOHN THOMANN; JOHN TOMASELLO; PAUL WALDMILLER, JR; NANCY WALKER; LEONARD WINTER; HORACE WOLCOTT; GERALD CRAWFORD; DAVID LONG; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

Defendants.

INTRODUCTION

Plaintiffs have petitioned for civil contempt claiming that, on October 20, 1990, defendants Bonnie Behn and Carla Rainero violated the provisions of this Court's temporary restraining order ("TRO") dated September 27, 1990. Plaintiffs seek compensatory and coercive civil contempt sanctions to remedy the loss they suffered as a result of the alleged violations, and to coerce defendants Behn and Rainero into conforming their behavior to the terms of the TRO in the future. An evidentiary

hearing on plaintiffs' petition was held over the course of several days from June 18, 1991 to July 12, 1991. The parties were then given an opportunity to brief and argue their respective positions.

After considering the evidence adduced at the hearing, reviewing the submissions of the parties, and hearing argument from counsel, the Court grants plaintiffs' petition for civil contempt. The following constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

BACKGROUND

Plaintiffs Buffalo GYN Womenservices, Erie Medical Center, Paul Davis M.D., Shalom Press M.D., Barnett Slepian M.D., Highland Obstetrical Group, and Alexander Women's Group are health care providers located in the Western New York area. They offer family planning services, abortion services and gynecological services at their health care facilities. Plaintiff Pro-Choice Network of Western New York is a not-for-profit corporation based in Buffalo, New York. It is dedicated to maintaining legal and safe access to family planning and abortion services in the Western New York area. It also provides individuals to serve as escorts for patients seeking access to the plaintiff health care providers' facilities.

Defendants in the main action include three organizations, Project Rescue Western New York, Operation Rescue and Project Life of Rochester, and 50 individuals, including Bonnie Behn and Carla Rainero. They are opposed to abortion and dedicated to the "pro-life" movement. Plaintiffs allege that defendants have been engaged in a consistent pattern of illegal conduct at plaintiffs' health care facilities including blockading access to and egress from their facilities, trespassing, and harassment and intimidation of their patients and staff.

Plaintiffs commenced the main action on September 24, 1990. Immediately upon filing their complaint, plaintiffs moved for a TRO, pursuant to Fed. R. Civ. P. 65(b), to enjoin a "blockade" that defendants had announced for September 28, 1990. The location of the blockade was to be kept secret until the morning it was scheduled to occur. On September 26, 1990, the Court conducted a hearing and heard argument on the TRO motion. On September 27, 1990, after hearing further argument from plaintiffs' counsel and some of the named defendants, and after reviewing the complaint and supporting affidavits, the Court, following New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990), issued a TRO (a copy of which is attached hereto as an Appendix) enjoining defendants from conducting any "blockade" of plaintiffs' abortion facilities and from harassing patients and staff entering or exiting the facilities.

Defendants complied with the TRO by holding a peaceful demonstration, rather than a full-fledged blockade, on September 28, 1990. The Court then scheduled a hearing for October 4, 1990, in order to determine whether the TRO should be converted into a preliminary injunction pursuant to Rule 65. At the October 4, 1991 hearing, plaintiffs established service on nearly all defendants, including Bonnie Behn and Carla Rainero, and James Duane, Esq. appeared on behalf of defendants. Defendants then moved to either dismiss or stay the action pursuant to the abstention doctrine. In a Decision and Order dated October 29, 1990, the Court denied defendants' motion to dismiss or stay the case. In an Order dated November 2, 1990, the Court, with defendants' consent, ordered that the TRO would remain in effect until the motion for a preliminary injunction

was decided.[1]

On October 22, 1990, plaintiffs filed a petition for contempt against defendants Bonnie Behn and Carla Rainero alleging that they violated the TRO on October 20, 1990. As stated earlier, an evidentiary hearing on plaintiffs' petition was held over the course of several days from June 18, 1991 to July 21, 1991. Plaintiffs called as witnesses Deborah Warnes, Cathleen McGuire, Marilynn Buckham and Lauren Zorfas. Defendants called as witnesses Thomas Troy, Barbara Toth and Richard Krolewicz. Behn and Rainero also testified. Following the hearing, the parties were given an opportunity to brief and argue their respective positions.

FINDINGS OF FACT

During the morning of October 20, 1990, Bonnie Behn and Carla Rainero were located in the vicinity of the Buffalo GYN Womenservices clinic at 1241 Main Street, Buffalo, New York. Abortions are performed at the Buffalo GYN Womenservices clinic and it was the intention of Behn and Rainero to dissuade women entering the clinic from obtaining abortions by offering them "sidewalk counseling."

At about 8:25 a.m., Behn and Rainero were standing on the northeast corner of the intersection of Main and Northampton Streets when an automobile heading west on Northampton Street slowly approached the intersection. The vehicle contained two young men and a young woman who were apparently searching for the Buffalo GYN Womenservices clinic.

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[1] The Court granted the motion for a preliminary injunction in a Decision and Order dated February 14, 1992.

The vehicle stopped at the intersection at which time Behn and Rainero approached the vehicle and tried to give the occupants literature.

The vehicle then turned right and headed north on Main Street. It proceeded up Main Street for one block and turned left onto Bryant Street. Behn and Rainero walked north along the east side of Main Street in pursuit of the vehicle and its occupants. Upon reaching the intersection of Bryant and Main, they observed the two young men and the young woman whom they had earlier observed in the vehicle walking east on Bryant toward Main. One of the young men was walking ahead of the others. He arrived at the intersection of Bryant and Main first and approached a pay telephone located on the corner.

Behn and Rainero crossed Main and began talking to the young woman who by that time had arrived at the corner. A short time after Behn and Rainero crossed Main Street, three "pro-choice" escorts, Deborah Warnes, Cathleen McGuire and Lauren Zorfas, who were located in the vicinity of the clinic, crossed Main Street and headed north toward the young woman and her companions in order to offer to escort them to the clinic.

Behn and Rainero initially asked the young woman whether she was seeking an abortion and offered her some literature. The woman responded that she was seeking an abortion but she refused to accept any literature. Behn and Rainero then told her of alternatives to having an abortion, such as adoption or keeping the child. They also offered her assistance and a place to stay if she decided to have the child. The young woman refused all offers of assistance.

Approximately two minutes after Behn and Rainero began talking to the young woman, the three "pro-choice" escorts

arrived at the corner and told the young woman and her companions that they were from the clinic. Upon hearing this, one of the young men stated, "Thank God." The escorts then offered to escort the young woman and her companions to the clinic. The young woman accepted the offer and began walking south on Main Street toward the clinic with the escorts. Behn and Rainero walked along side the young woman, her companions and the escorts, and continued talking to the young woman.

At one point, Behn offered to call the young woman's mother and inform her that the young woman was going to have an abortion. Upon hearing this, the young woman became visibly upset and agitated, and responded, "No. The same thing happened to my sister. I can't. I can't do that." Despite this response, Behn continued to ask the young woman whether she wanted Behn to call her mother.

As the young woman attempted to make her way toward the clinic, Behn and Rainero continued to talk to her. The young woman became increasingly upset and began crying, whimpering and shaking. She was particularly upset by Behn's constant offers to call her mother.

Finally, one of the "pro-choice" escorts explained to the young woman that there was a TRO in effect and Behn and Rainero would have to stop talking to her if she asked them to do so. The young woman turned to Behn and Rainero and asked them to leave her alone. Despite Behn and Rainero's testimony to the contrary, it was clear that the young woman was asking both Behn and Rainero to leave her alone.

In response to the request to be left alone, Behn took a step back, said, "Carla," and nodded to Rainero to move forward and continue talking to the young woman "as if it were a tag

team relay." Rainero moved closer to the young woman and began talking to her. One of the "pro-choice" escorts told Rainero that the young woman had already asked to be left alone. Rainero responded that, "She didn't say it to me." The "pro-choice" escort suggested to the young woman that she again ask Rainero to leave her alone. The young woman then turned to Rainero and asked Rainero to leave her alone. Behn and Rainero, however, ignored the young woman's pleas to be left alone and continued to pursue her and communicate their message all the way up to the clinic's Main Street entrance.[2]

At some point during this incident, two male "pro-life" demonstrators who were on the east side of Main Street crossed the street and began to follow the young woman, her companions, the "pro-choice" escorts, Behn and Rainero down Main Street toward the clinic. One of these men, Richard Krolewicz, was carrying a video camera and appeared to be videotaping the incident.

At the hearing, defendants produced Krolewicz's videotape. While the videotape was admitted into evidence, the Court has given it little consideration in its decision as there is a significant gap in the middle of the tape. The tape begins by showing the "pro-choice" escorts crossing Main Street as they headed toward the young woman and her companions on the corner of Bryant and Main. However, the tape then jumps ahead approximately five minutes and shows the young woman, her companions, the "pro-choice" escorts, Behn and Rainero heading

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[2] Plaintiffs also allege that there was a second incident involving Behn that occurred at about 11:10 a.m. on October 20, 1990. However, there was little evidence adduced at the hearing concerning the second incident. Thus, the Court has not considered this incident in its decision.

south on Main Street back toward the clinic. Thus, the crucial portion of the incident when Behn and Rainero were alleged to have violated the TRO is not included on the tape. Accordingly, the Court finds that the videotape is not a fair and accurate representation of the pertinent facts and will rely instead on the testimony adduced at trial.

CONCLUSIONS OF LAW

I. Standing

In Terry, the Second Circuit held that health care providers have independent standing to assert the rights of their patients to travel freely and to obtain abortion services. The court reasoned that a patient's "enjoyment of those rights is `inextricably bound up with the activity the litigant wishes to pursue,'" and thus, the court could be "assured that the clinics represent the rights and interests of the women seeking their assistance." Id. at 1348. The Terry court also held that "pro-choice" organizations had standing as representatives of their membership. Id. at 1349. Thus, plaintiffs have standing to enforce the Court's TRO.

II. Civil Or Criminal Contempt

Defendants claim that the requested contempt sanctions are criminal in nature and they must therefore be afforded all the constitutional protections associated with a criminal proceeding before they can be held in contempt of the Court's TRO. See Hicks v. Feiock, 485 U.S. 624 (1988) ("[C]riminal penalties may not be imposed on someone who has not been afforded the protection that the Constitution requires of such criminal proceedings . . . ."). The Court disagrees.

An individual who fails to obey a valid court order is subject to both civil and criminal contempt penalties for the same acts. United States v. Petito, 671 F.2d 68, 72 (2d Cir.), cert. denied, 459 U.S. 824 (1982). The general principles distinguishing civil and criminal contempt are well established.

> The two species of contempt are distinguished by determining the purpose for which the sanction [is] imposed. A sanction imposed to compel obedience to a lawful court order or to provide compensation to a complaining party is civil. A sanction imposed to punish for an offense against the public and to vindicate the authority of the court, that is, not to provide private benefits or relief, is criminal in nature.

Terry, 886 F.2d at 1350-51 (citations omitted). Thus, civil contempt sanctions serve two purposes: (1) to coerce future compliance with the court's order; and (2) to compensate the complainant for losses stemming from noncompliance. New York State NOW v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988) (citations omitted). In many similar cases brought in other federal courts, including the Second Circuit, against anti-abortion protestors, the courts have had the opportunity to discuss the difference between civil and criminal contempt, and have uniformly concluded that contempt sanctions of the type sought here against Behn and Rainero are civil in nature. New York State NOW v. Terry, No. 90-6187, slip op. at 9198 (2d Cir. Apr. 13, 1992); Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990); Portland Feminist Women's Health Center v. Advocates for Life Inc., 887 F.2d 787 (9th Cir. 1989); Terry, 697 F. Supp. at 1329-30; 886 F.2d at 1350-51.

Behn and Rainero argue that the instant proceedings necessarily involve the imposition of criminal contempt

sanctions. The crux of their argument is that because these proceedings are occurring after the conclusion of the conduct complained of, they have no opportunity to cure their contempt and any sanction imposed is therefore punitive in nature.

It is abundantly clear, however, that the present contempt proceedings are civil, rather than criminal, in nature. These contempt proceedings were initiated by plaintiffs, not by the Court or the government. Further, plaintiffs seek only to enforce their rights under the TRO and to remedy the harm caused by defendants' past violations. The proceedings seek the imposition of conditional and coercive fines in amounts clearly specified in the TRO itself. The condition can be avoided by compliance and the coercive nature of the fine derives from its encouragement of future compliance. It is undisputed that Behn and Rainero were on notice of the TRO and the penalties they would face for noncompliance. Thus, they violated the TRO at their own peril and must be sanctioned in order to coerce their future compliance.

III. Collateral Attack

Behn and Rainero, in arguing against the imposition of contempt sanctions, raise several challenges to the propriety of the Court's TRO. They argue that: (1) the "cease and desist" language in the TRO violates their First Amendment right to freedom of speech and is therefore unconstitutional; (2) the "tortious harassment" language is unconstitutionally vague and overbroad; and (3) the TRO is legally invalid because plaintiffs never showed a threat of irreparable harm. The Court finds, however, that the collateral bar rule precludes Behn and Rainero from challenging the validity of the underlying TRO as a defense against the imposition of contempt sanctions.

The collateral bar rule is longstanding and its purpose is clear.

> If a party can make himself a judge of the validity of orders that have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). "The orderly and expeditious administration of justice requires that `an order issued by a court with jurisdiction over the subject matter and the person must be obeyed by the parties until it is reversed by orderly and proper proceedings.'" Maness v. Meyers, 419 U.S. 449, 459 (1975) (quoting United States v. United Mine Workers, 330 U.S. 258, 293 (1947)). "A `contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.'" Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 441 n.21 (1986) (quoting Maggio v. Zeitz, 333 U.S. 56 (1948)).

The Supreme Court has applied the collateral bar rule even when the underlying injunction may tread upon important First Amendment rights. In Walker v. City of Birmingham, 388 U.S. 307 (1967), the Court ruled that civil rights protestors, who were charged with contempt for marching in Birmingham without a parade permit in violation of a state court's temporary injunction, could not litigate the validity of the order in the contempt proceedings. The Court reached this conclusion despite serious reservations about the constitutionality of the underlying order. Id. at 317. The Court explained that:

> [N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

Id. at 320-21.

In the instant case, the Court has jurisdiction over the parties and the subject matter.[3] The Court finds that its TRO is not transparently invalid, but rather was carefully crafted to protect defendants' First Amendment rights. The TRO was in effect for almost one month before the alleged violations and throughout that entire period neither Behn, Rainero nor any of the other defendants moved to modify or vacate the TRO. In fact, Behn, Rainero and the other defendants, through their attorney, consented to the extension of the TRO until the Court decided plaintiffs' motion for a preliminary injunction. Had defendants refused to consent to the extension of the TRO, the Court would have been faced with the option of: (1) letting the TRO expire in accordance with Fed. R. Civ. P. 65(b); or (2) immediately converting the TRO into a preliminary injunction thereby making it an appealable order. Thus, Behn and Rainero had ample opportunity to challenge the validity of the TRO

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[3] The defendants did make a motion to dismiss the case based on the abstention doctrine. However, in a Decision and Order dated October 29, 1990, the Court denied the motion.

directly before this Court and before the Second Circuit Court of Appeals, rather than through a contempt proceeding. Instead, they chose to consent to an extension of the TRO.

IV. Civil Contempt Standard

A court can hold a party in civil contempt only when: (1) the order that the party allegedly failed to comply with is clear and unambiguous; (2) the proof of noncompliance is "clear and convincing"; and (3) the party has not been reasonably diligent and energetic in attempting to comply with the order. EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, 925 F.2d 588, 594 (2d Cir. 1991); Terry, 886 F.2d at 1351. It is not necessary for the plaintiff to prove that the defendant willfully disobeyed the order. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Donovan v. Sovereign Sec. Co., 726 F.2d 55, 59 (2d Cir. 1984). After applying this standard to the instant case, the Court finds that both Behn and Rainero were in civil contempt of the TRO on October 20, 1990.

A. The Order is Clear and Unambiguous

Fed. R. Civ. P. 65(d), requires that injunctions be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." The Rule was intended to prevent an uncertain or vague decree from becoming the basis for a contempt citation. See Schmidt v. Lessard, 414 U.S. 473 (1974). To comply with the specificity and clarity requirements of Rule 65, an injunction must be specific and definite enough to give a person of ordinary intelligence fair notice of what conduct is prohibited. Terry, 886 F.2d at 1352 (citing In re Baldwin-United Corp., 770 F.2d 328, 339 (2d Cir. 1985)); cf. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

The Court finds that the conduct that lay between that which was prohibited and that which was permitted by the proscriptives of the TRO was sufficiently clear for defendants to ascertain precisely what they could and could not do. Thus, the TRO is sufficient to serve as a foundation for a contempt citation.

B. Proof of Noncompliance

Civil contempt petitions require proof by "clear and convincing evidence." Terry, 886 F.2d at 1352; Securities & Exch. Comm'n v. American Bd. of Trade, 830 F.2d 431 (2d Cir. 1987), cert. denied, 485 U.S. 938 (1988). "Clear and convincing evidence" is an intermediate standard of proof that is beyond a "preponderance of the evidence" standard, but not as stringent as "beyond a reasonable doubt." Addington v. Texas, 441 U.S. 418, 424 (1978). This standard is appropriate for the protection of "particularly important individual interests" that nevertheless do not implicate the fundamental liberty interests found in criminal cases. Id. The "clear and convincing evidence" standard is met by evidence that produces in the mind of the trier of fact "an abiding conviction that the truth of [the] factual contentions are 'highly probable.'" Colorado v. New Mexico, 467 U.S. 310, 316 (1983). After applying the "clear and convincing evidence" standard to this case, the Court finds that plaintiffs have met their burden of proving Behn and Rainero's noncompliance with the TRO on October 20, 1990.

The evidence adduced at trial clearly showed that Behn and Rainero violated ¶ 1(b) of the TRO. Paragraph 1(b) states in pertinent part that:

> [N]o one is required to accept or listen to sidewalk counseling and . . . if anyone who wants to, or who is sought to be counseled who wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event the persons seeking to counsel that person shall cease and desist from such counseling of that person.

The young woman expressly requested Behn and Rainero to leave her alone twice during the incident on October 20, 1990. However, Behn and Rainero ignored the young woman's manifested desire to be left alone and continued to counsel her. This conduct violates the "cease and desist" provision of the ¶ 1(b).

C. Reasonable Diligence

The Court finds that Behn and Rainero were not reasonably diligent and energetic in attempting to achieve compliance with the TRO. Instead, they attempted to circumvent the "cease and desist" provision of the TRO by using a "relay" system, i.e., once the targeted person rejects the counseling of a particular "sidewalk counselor," another one steps forward and continues counseling. This "relay" system obviously violates the spirit, if not the letter, of the "cease and desist" provision. Once the targeted person or group of persons rejects counseling, that rejection is applicable to all "sidewalk counselors." It is not incumbent upon the target of the counseling to say "no" to each and every "sidewalk counselor" who might be present.

V. Amount and Disposition of the Fines

When imposing civil contempt sanctions for the purpose of coercing compliance with a court order, a court should consider: (1) the character and magnitude of the harm threatened

by continued contempt; (2) the probable effectiveness of the proposed sanctions; and (3) the financial consequences of the sanction on the contemnor and the consequent seriousness of the burden of the sanction upon him or her. Terry, 697 F. Supp. at 1332-33; 886 F.2d at 1353. "The ultimate consideration is whether the coercive sanction–here, a fine–is reasonable in relation to the facts." Terry, 886 F.2d at 1353 (citations omitted).

The TRO provides that failure to comply will subject the contemnor to civil damages of $10,000 per day for the first violation. The TRO further provides that for successive violations, the contemnor will be subject to a civil contempt fine double that of the previous fines.

The Court finds that the character and magnitude of the harm threatened by Behn and Rainero's continued contumacy is such that a substantial sanction is appropriate. Unless they are sanctioned, Behn and Rainero's conduct may be emulated by other defendants and "pro-life" activists. Further, neither Behn nor Rainero have made a showing that they would be unduly burdened by a substantial sanction.

Accordingly, the Court will order Behn and Rainero to each pay $10,000 in damages to plaintiff Buffalo GYN Womenservices. Buffalo GYN Womenservices has made an uncontested showing of both actual injury, in the form of disrupted daily operations and patients rendered upset and distressed, and compensable loss, consisting of the cost of extra security measures and additional staff. Given this showing of actual injury and compensable loss, the Court finds that it is appropriate to award damages to Buffalo GYN Womenservices for Behn and Rainero's unlawful conduct. See New York v. Shore Realty Corp., 763 F.2d 49, 54 (2d Cir. 1985); Vuitton v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979).

In addition to the contempt sanction, plaintiffs also seek all costs and attorneys' fees associated with enforcing the Court's TRO. The TRO provides that a contemnor is liable "for all attorneys' fees and related costs incurred by plaintiffs in relation to the enforcement of this Order." In addition, it is well established that a successful complainant in a contempt proceeding is entitled to the reasonable costs of prosecuting the contempt, including attorneys' fees, if the violation of the court's order is found to have been wilful. Canterbury Belts, Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 39 (2d Cir. 1989); Vuitton, 592 F.2d at 130.

In this case, the TRO clearly put Behn and Rainero on notice that they could be held liable for attorneys' fees and costs associated with enforcement of the Order. Thus, plaintiffs are entitled to attorneys' fees and related costs. Further, the Court finds that Behn and Rainero's violation of the TRO was wilful. Even though the TRO clearly and unambiguously spelled out the prohibited activity, Behn and Rainero refused to "cease and desist" from counseling the young woman after being asked twice to do so. These actions clearly manifested Behn and Rainero's intention to violate the Order.

CONCLUSION

For the reasons stated, the Court grants plaintiffs' petition for civil contempt against both Behn and Rainero. The Clerk of Court shall immediately enter judgments against both Behn and Rainero in the amount of $10,000 each. In addition, the Court grants plaintiffs' request for reasonable attorneys' fees and costs associated with prosecuting the contempt. Plaintiffs shall file an affidavit of attorneys' fees and costs by September 18, 1992. Behn and Rainero shall have until October 16, 1992 to respond.

It is so ordered.

/s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: August 14, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PRO-CHOICE NETWORK OF WESTERN NEW YORK; BUFFALO GYN WOMENSERVICES, P.C.; ERIE MEDICAL CENTER; PAUL J. DAVIS, M.D., P.C.; SHALOM PRESS, M.D.; BARNETT SLEPIAN, M.D.; MORRIS WORTMAN, M.D.; HIGHLAND OBSTETRICAL GROUP; ALEXANDER WOMEN'S GROUP,

Plaintiffs,

THE CHILDREN'S HOSPITAL OF BUFFALO,

Intervenor-Plaintiff,

v.

DECISION AND ORDER
90-CV-1004A

PROJECT RESCUE WESTERN NEW YORK; OPERATION RESCUE; PROJECT LIFE OF ROCHESTER; REV. PAUL SCHENCK; REV. JAMES L. EVANS; REV. TED CADWALLADER; DWIGHT SAUNDERS; DAVID ANDERSON; JEFFREY BARAN; BRIAN BAYLEY; BONNIE BEHN; RONALD BREYMEIER; GILBERT CERTO; SCOTT CHADSEY; KIM DAY; CONSTANCE DEBO; MARK DENT; WAYNE DENT; PAUL DIEMERT; JOAN GIANGRECO;

DELORES GLASER; CARMELINA GOLBA, KEVIN GOLBA; LINDA HALL; NANCY HALL; THOMAS HALL; REV. DANIEL HAMLIN; JAMES HANDYSIDE; PAMELA HUFFNAGLE; DONNA JOHANNS; ERIC JOHNS; NEAL KOCHIS; PAULETTE LIKOUDIS; CHARGES MCGUIRE; CHRISTOPHER MORROW; ANNEMARIE NICE; NICHOLAS PUKALO; CARLA RAINERO; THOMAS RILEY; PATRICIA OSTRANDER; LINDA ROSS; DAVID SMITH; LINDA SMITH; MARK STERLACE; JOYCE STRIGEL; JOHN THOMANN; JOHN TOMASELLO; PAUL WALDMILLER, JR; NANCY WALKER; LEONARD WINTER; HORACE WOLCOTT; GERALD CRAWFORD; DAVID LONG; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

Defendants.

INTRODUCTION

Plaintiffs have petitioned for civil contempt claiming that, on December 29 1990, Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue Western New York ("Project Rescue") violated the provisions of this Court's temporary restraining order ("TRO") dated September 27, 1990. Plaintiffs seek compensatory and coercive civil sanctions to remedy the loss they suffered as a result of the alleged violations, and to coerce defendants into conforming their behavior to the terms of the TRO in the future. An evidentiary hearing on plaintiffs' petition was held over the course of several days from October 15, 1991 to January 30, 1992.

After considering the evidence adduced at the hearing, reviewing the submissions of the parties, and hearing argument from counsel, the Court grants plaintiffs' petition for civil contempt. The following constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

BACKGROUND

Plaintiffs Buffalo GYN Womenservices, Erie Medical Center, Paul Davis M.D., Shalom Press M.D., Barnett Slepian M.D., Highland Obstetrical Group, and Alexander Women's Group are health care providers located in the Western New York area. They offer family planning services, abortion services and gynecological services at their health care facilities. Plaintiff Pro-Choice Network of Western New York is a not-for-profit corporation based in Buffalo, New York. It is dedicated to maintaining legal and safe access to family planning and abortion services in the Western New York area. It also provides individuals to serve as escorts for patients seeking access to the plaintiff health care providers' facilities.

Defendants in the main action include three organizations, Project Rescue, Operation Rescue and Project Life of Rochester, and fifty individuals, including Rev. Paul Schenck. They are opposed to abortion and dedicated to the "pro-life"

movement. Plaintiffs allege that defendants have been engaged in a consistent pattern of illegal conduct at plaintiffs' health care facilities including blockading access to and egress from their facilities, trespassing, and harassment and intimidation of their patients and staff.

Plaintiffs commenced the main action on September 24, 1990. Immediately upon filing their complaint, plaintiffs moved for a TRO, pursuant to Fed. R. Civ. P. 65(b), to enjoin a "blockade" that defendants had announced for September 28, 1990. The location of the blockade was to be kept secret until the morning it was scheduled to occur. On September 26, 1990, the Court conducted a hearing and heard argument on the TRO motion. On September 27, 1990, after hearing further argument from plaintiffs' counsel and some of the named defendants, and after reviewing the complaint and supporting affidavits, the Court, following New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990), issued a TRO (a copy of which is attached hereto as an Appendix) enjoining defendants from conducting any blockade of plaintiffs' abortion facilities and from harassing patients and staff entering or exiting the facilities.

Defendants complied with the TRO by holding a peaceful demonstration, rather than a full-fledged blockade, on September 28, 1990. The Court then scheduled a hearing for October 4, 1990, in order to determine whether the TRO should be converted into a preliminary injunction pursuant to Rule 65. At the October 4, 1991 hearing, plaintiffs established service on nearly all defendants, including Rev. Paul Schenck and Project Rescue, and James Duane, Esq. appeared on behalf of defendants. Defendants then moved to either dismiss or stay the action pursuant to the abstention doctrine. In a Decision and Order dated October 29, 1990, the Court denied defendants' motion to

dismiss or stay the case. In an Order dated November 2, 1990, the Court, with defendants' consent, ordered that the TRO would remain in effect until the motion for a preliminary injunction was decided.[1]

On March 26, 1991, plaintiffs filed a petition for civil contempt against Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue alleging that they violated the TRO on December 29, 1990. As stated earlier, an evidentiary hearing on plaintiffs' petition was held over the course of several days. Plaintiffs called as witnesses Marilynn Buckham, Karen Swallow Prior, Elizabeth Sholes, Gerald J. Carriero, David M. Crossland, Deborah Warnes and Jacqueline Albarella. Defendants called as witnesses Mark Smith, Dennis Marriott, Julianna Prestia, Richard Krolewicz and Steven Asposto. Rev. Paul Schenck and Rev. Robert Schenck also testified. Following the hearing, the parties were given an opportunity to brief and argue their respective positions.

FINDINGS OF FACT

Rev. Paul Schenck and Rev. Robert Schenck are both ordained ministers and are very active in the local "pro-life" movement. Paul Schenck is a named defendant in the main action. Robert Schenck is not.

Project Rescue is an organization dedicated to the "pro-life" movement. It is a named defendant in the main action. As the Court stated in its February 14, 1992 Preliminary Injunction Decision and Order:

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[1] The Court granted the motion for a preliminary injunction in a Decision and Order dated February 14, 1992.

> [A]lthough not organized in corporate or partnership form, Project Rescue produces and distributes literature that encourages participants to gather in front of abortion clinics and block or impede access to them, has official spokespersons and designated leaders who organize and plan its activities, possesses a mailing address, engages in correspondence, has an active telephone "hotline," seeks donations in its name, and reimburses its members for expenses. Thus, Project Rescue possesses adequate characteristics of a legal entity to be enjoined or held in contempt.

Project Rescue regularly sponsors "rescue" demonstrations at abortion clinics throughout the District. These demonstrations are intended to dissuade women from entering the clinics and to communicate the "pro-life" message to the public. Project Rescue sponsors a "rescue" demonstration almost every Saturday morning at plaintiff Buffalo GYN Womenservices' clinic located at 1241 Main Street, Buffalo, New York.

On the morning of December 29, 1990, Project Rescue sponsored one of its regular Saturday morning "rescue" demonstrations at 1241 Main Street. Several people who have previously testified in this case that they are regular Project Rescue participants–Nancy Walker, Bonnie Behn and Michael Prestia–were present at this demonstration and engaged in the usual Project Rescue activities such as demonstrating, picketing and "sidewalk counseling." Two other Project Rescue participants, Richard Krolewicz and Mark Smith, videotaped much of what

occurred that morning[2] and their videotapes were admitted into evidence at the hearing.[3]

Also present at 1241 Main Street that morning were Rev. Paul Schenck and Rev. Robert Schenck. Paul Schenck is a leader of Project Rescue. He has led various Project Rescue activities and solicited money by mail and at church services in the name of Project Rescue. Robert Schenck is a participant in Project Rescue.

Although Paul and Robert Schenck are "identical" twins, they do possess distinguishing features that enable others, including this Court, to tell them apart. On the morning of December 29, 1990, they were dressed similarly. They both were wearing dark gray or black long overcoats and gray brimmed hats. However, there were some noticeable differences in their attire. Paul Schenck was wearing light gray slacks while Robert Schenck was wearing darker gray or black slacks. Further, Paul Schenck was wearing a necktie with a polka-dot pattern while Robert Schenck was wearing a tie with a paisley-like pattern. Finally, Paul Schenck was wearing eyeglasses with tortoise shell colored frames while the frames of Robert Schenck's glasses were part metal and part tortoise shell.

At the hearing, the Schencks insisted that they were not

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[2] Krolewicz used a videocamera owned by Project Rescue.

[3] Plaintiffs contend that defendants' videotapes were edited after the fact in order to delete incriminating footage. Both sides presented expert testimony on the issue of whether the tapes were edited. The Court finds the expert testimony inconclusive and will use those portions of the videotape that are corroborated by other credible evidence or otherwise fairly and accurately depict the relevant facts.

present at 1241 Main Street on December 29, 1990 as part of Project Rescue. Rather, they contend that they were there only to evangelize and preach. The Court finds, however, that their testimony in this regard is not credible. Despite their protestations to the contrary, the Schencks did not pick 1241 Main Street at random as a location to evangelize and preach–they obviously were there because the abortion clinic is there. The Schencks had been at that location before and knew that abortions were performed at the clinics. The videotapes offered by the defendants clearly show the Schencks conversing with other Project Rescue participants, walking with them, answering their questions and directing their activities. The videotapes and the testimony adduced at the hearing also establish that, on at least three separate occasions, which will be discussed in more detail later, the Schencks attempted to dissuade women from entering the clinic. Thus, the evidence adduced at the hearing established clearly and convincingly that Paul and Robert Schenck were present at 1241 Main Street on December 29, 1990 as part of Project Rescue and in furtherance of its goals, and that the Schencks were acting in concert with each other, with Project Rescue and with the other Project Rescue participants present that morning.

At approximately 7:54 a.m., an automobile heading north on Main Street pulled over to the curb in front of the Main Street entrance to the clinic.[4] At that moment, the Schencks were located just north of the clinic entrance and were walking south on the sidewalk along Main Street.

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[4] Plaintiffs claim that there was also an earlier violation of the TRO at about 7:45 a.m. that involved Paul Schenck and one of the "pro-choice" escorts, Elizabeth Sholes. The Court has not considered that incident in this decision.

After the automobile pulled over to the curb, a woman in a yellow rain slicker got out of the passenger side of the vehicle and began to walk quickly toward the clinic entrance. The clinic entrance is approximately twenty feet from the curb. Upon seeing the vehicle pull over and the woman exit, Paul and Robert Schenck immediately hurried toward her and began to exhort her not to have an abortion. With raised voices, they told the woman that she should not enter the clinic, she should not have an abortion and she should not kill her baby.

The woman walked quickly into the alcove located at the entrance of the clinic.[5] The Schencks pursued the woman into the alcove and continued to exhort her in a loud manner. The woman then opened the glass door in the alcove and went into the vestibule. At this point, both Schencks were located inside the alcove[6] and were standing shoulder to shoulder. Their presence there effectively blocked the entrance to the clinic. After repeated warnings by "pro-choice" escort Deborah Warnes that they were on private property and should leave immediately, the Schencks exited the alcove.

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[5] The alcove is located on private property that is leased to the clinic. The alcove leads to a glass door which in turn leads into a vestibule. In the vestibule across from the glass door is a solid door with a small window which leads into the clinic. The door is kept locked and is opened electronically from inside the clinic. The floor of the alcove is clearly distinguishable from the public sidewalk that abuts it. The alcove floor is made of light colored tiles while the sidewalk is made of gray concrete. "Pro-choice" escorts often stand in the alcove in order to avoid bad weather. The escorts were blue aprons which have printed on them the words "PRO-CHOICE ESCORT."

[6] At the hearing, both Schencks admitted going into the alcove that morning.

At approximately 8:11 a.m., Paul Schenck was located directly in front of the Main Street entrance to the clinic and was engaged in conversation with a security guard employed by the clinic when a young woman attempted to enter the clinic through the Main Street entrance with the assistance of several "pro-choice" escorts. Schenck turned toward the woman and began to exhort her not to enter. He also offered her some literature. The woman made her way past Schenck, went into the alcove and entered the vestibule through the glass door. Schenck followed the woman into the alcove and continued to exhort her not to have an abortion. After the woman went into the vestibule, Schenck moved close to the closed glass door leading into the vestibule and shouted at the woman through the closed door.

Immediately following the incident at 8:11 a.m., Paul Schenck left the clinic's Main Street entrance, walked around the corner onto Northampton Street and took up a position near the driveway entrance to the parking lot behind 1241 Main Street. Somewhere in his trip between the Main Street entrance and the driveway entrance he met his brother Robert who gave him the red umbrella that Robert had been carrying. Robert then walked around the corner and took up a position in front of the Main Street entrance.

About this time, a light gray Volvo sedan with Pennsylvania license plates turned from Main Street onto Northampton Street heading east. A woman was driving the vehicle and a young woman was in the passenger's seat. The vehicle slowed down as it approached the driveway entrance to the clinic parking lot. David Crossland, who acts as a "pro-choice" escort on a regular basis at 1241 Main Street, testified that, based on the ages of the women and the vehicle's Pennsylvania license plates, he believed the women were looking

for the clinic parking lot. The two women in the vehicle looked directly at the driveway entrance and the Project Rescue participants who were milling around the entrance. The women appeared confused and anxious. They then drove by the driveway entrance, continued down Northampton and disappeared around the corner.

The same vehicle returned to the area of the driveway entrance a few minutes later. This time the vehicle was heading west on Northampton. Again the vehicle slowed down but did not turn into the driveway. Instead, it continued on Northampton and disappeared.

A brief time later, the vehicle again appeared near the driveway entrance heading west on Northampton. This time the driver signaled that she intended to turn left into the driveway. As the vehicle slowed down and began to make the left turn into the driveway, Paul Schenck placed himself directly in front of the vehicle on the driver's side of the hood in order to block the vehicle from entering. His body was very close to the vehicle and eventually was touching it. Schenck exhorted the women in the vehicle not to enter the clinic and tried to offer them literature. Other Project Rescue participants approached the vehicle from the driver's side and exhorted the driver to open her window.

So as to not run over Schenck, the vehicle slowed down until it was inching along. At one point it momentarily stopped. Schenck eventually began to give ground and moved from the front of the vehicle to the driver's side. Once Schenck was away from the front of the vehicle, it was able to increase speed and move down the driveway into the parking lot.

At the hearing, neither Paul Schenck nor Robert Schenck could recall whether he was the person shown in the videotape

blocking the Volvo from entering the driveway. While the videotape does not show the face of the person blocking the vehicle as that person's face is covered by a red umbrella, the Court finds by clear and convincing evidence that the person who blocked the vehicle was Paul Schenck.

First, the Court finds the Schencks' inability to recollect the incident to be totally incredible. The Court cannot believe that anybody would forget such an incident, especially after being shown a videotape of it. This was not a normal everyday occurrence, even for the Schencks who testified that they are regularly involved in this type of activity. It was something that anybody would remember, particularly after seeing the videotape.

Second, David Crossland testified that it was Paul Schenck, not Robert Schenck, who blocked the vehicle, and defendants did not produce any credible evidence to rebut his testimony.

Finally, despite the fact that the person's face is not shown on the videotape, the Court is still able to determine from the tape that it was Paul Schenck under the umbrella. The videotape clearly shows that the person under the umbrella was wearing light gray slacks. As stated earlier, Paul Schenck was wearing light gray slacks that morning while Robert Schenck was wearing darker gray or black slacks. Thus, there can be no doubt that it was Paul Schenck who blocked and impeded the vehicle from entering the driveway that morning.[7]

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[7] It appears from the videotape that Paul Schenck intentionally used the red umbrella to hide his face from the camera. He held the umbrella between himself and the camera during the entire incident and then, after the vehicle finally was able to get by him, he purposely

Sometime later that morning, a young man and young woman exited the rear entrance of the clinic and walked up the driveway toward Northampton Street where their automobile was parked. When they reached the driveway entrance they encountered Paul Schenck who began to exhort them to stop and talk with him. He also offered them literature. The young man and young woman waved Schenck away and started to walk quickly toward their vehicle that was parked approximately one hundred feet down the street. Schenck pursued the couple and continued to ask them to stop and talk to him. The young man became increasing agitated and upset, and finally threatened to strike Schenck if he did not stop bothering him. The young woman also became upset and tried to calm the young man. The videotape shows that, at one point during the encounter, the young woman held up her hand to signal Schenck to cease and desist. Schenck ignored all requests by the couple to be left alone and pursued them all the way to their vehicle.

The Court finds that the Schencks were not entirely credible witnesses. Their answers to questions on cross-examination were very often evasive and nonresponsive. In fact, the Court finds that Paul Schenck made false statements under affirmation.

During cross-examination, Paul Schenck was asked whether he and his brother, at some point during the morning, switched neckties in order to make it more difficult for the "pro-choice" escorts to tell them apart. In response, Schenck consistently denied that he and his brother swapped ties. At the beginning of cross-examination, he gave the following testimony:

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retreated up Northampton with the umbrella strategically placed to hide his identity from the camera.

Q: Did you do anything that morning, or was there any effort that morning to confuse people as to the identity of yourself as opposed to your brother?

A: No.

Q: That morning, did you–did you ever change your coat with your brother?

A: No.

Q: You didn't exchange coats?

A: No.

Q: You didn't exchange slacks either, did you?

A: No.

Q: And you didn't exchange hats?

A: No, not–not intentionally. Hats were blowing off the heads repeatedly and it's possible we could have picked up the wrong one but no, not intentionally.

Q: And you didn't exchange ties?

A: No.

Transcript at 1999.

Later, he testified as follows:

Q: Did you ever change ties with your brother in the

alcove that morning?

A: In the alcove? No.

Q: The alcove to the post office?

A: In the vestibule?

Q: Did you change ties with your brother at any time that morning?

A: Not that I recall, No.

Transcript at 2007.

Schenck's statements denying that he and his brother switched neckties that morning were false. The videotape clearly and convincingly shows that they swapped ties. In fact, the tape shows that they also swapped eyeglasses. At 8:38 a.m., the tape shows Paul Schenck talking into the camera. He is wearing a tie with a polka-dot pattern and eyeglasses with tortoise shell frames. At 8:39 a.m., he turns around and starts walking north on Main Street toward the corner of Main and Northampton. He is then approached by Nancy Walker who begins talking to him. As Paul is walking slowly and listening to Walker, his brother Robert is walking ahead. The camera is positioned behind them. After listening to Walker, Paul Schenck calls to his brother who stops and turns around. The camera then shuts off. When the camera starts up again, the time is 8:43 a.m. The camera is now in front of the Schencks. It shows them adjusting their gloves and hats as they walk around the corner and head down Northampton Street. The tape clearly shows that Robert Schenck is now wearing the tie with the polka-dot pattern and the eyeglasses with the tortoise shell frames that his brother Paul was

wearing just a few minutes earlier. Likewise, Paul has on the tie and eyeglasses that were seen on Robert earlier in the tape. Thus, the videotape clearly establishes that between 8:39 and 8:43 a.m. the Schencks switched ties and eyeglasses. The only conceivable purpose for such a switch was to make it more difficult for people to tell them apart.[8] Accordingly, the Court finds that Paul Schenck made false statements under affirmation concerning a material matter, that is, whether he and his brother swapped ties to make identification more difficult and that his entire testimony is therefore suspect.[9]

The Court further finds that the Schencks' violations of the TRO were intentional. It is clear that, prior to arriving at 1241 Main Street that morning, the Schencks planned to violate the Order and then contend that their conduct was protected by the Freedom of Religion Clause of the First Amendment. This is demonstrated by the fact that the Schencks staged and orchestrated certain portions of the videotape in order to support their contention that they were present that morning only to evangelize and preach. There are many instances in the tape where the Schencks turn to the camera in order to explain that the literature they are distributing deals with religion rather than abortion. What the Schencks fail to understand, however, is that the TRO proscribes specific conduct, not speech or religion. Acts such as blocking the entrance to a clinic or trespassing on private property are pure conduct and are not protected by either the

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[8] It appears from the videotape that the idea to switch ties came from Nancy Walker.

[9] In light of the Court's finding that Rev. Schenck made false statements under affirmation, a possibility exists that a crime was committed, and the Court therefore has a duty to refer the matter to the United States Attorney for whatever action he deems appropriate.

Free Speech Clause or the Freedom of Religion Clause of the First Amendment. It does not matter whether these acts are motivated by the desire to stop abortion or the desire to spread one's religion. The acts themselves are unlawful regardless of the reasons they are committed.

Robert Schenck contends that he cannot be found in contempt of the TRO because he is not a named defendant and did not have notice. The evidence adduced at the hearing, however, showed clearly and convincingly that, while he is not a named defendant, Robert Schenck did have actual notice of the TRO.

For example, the testimony of Elizabeth Sholes established that on September 28, 1990, Robert Schenck was located outside an abortion clinic located at 666 Colvin Avenue, Kenmore, New York, when a United States Marshal read the TRO over a loudspeaker. Sholes testified that she was standing the same distance away from the speaker as Schenck and the announcement of the TRO was clearly audible.

In addition, Robert Schenck admitted during his testimony that, prior to December 29, 1990, he had read the TRO. He testified as follows:

> Q[Plaintiffs' Attorney]: Did you make an effort to become familiar with the terms of the temporary restraining order?
>
> A: I did ask individuals who had read it through.
>
> Q: But you never read through it yourself?
>
> A: I have to say that I did not in careful detail, no.

Transcript at 92.

The Court interprets Schenck's last response as an admission that he did read the TRO, albeit not in careful detail. If the Court were to interpret Schenck's response to mean that he never read the TRO, it would make his use of the words "in careful detail" superfluous. However, after considering Rev. Schenck's testimony throughout the hearing, it is clear that he is a man who picks and chooses his words with great care and deliberateness. Thus, the only interpretation possible is that he read the TRO, albeit not carefully. It follows, therefore, that he must have been in possession of TRO, at least long enough to have read it.[10]

CONCLUSIONS OF LAW

I. Standing

In Terry, the Second Circuit held that health care providers have independent standing to assert the rights of their patients to travel freely and to obtain abortion services. The court reasoned that a patient's "enjoyment of those rights is `inextricably bound up with the activity the litigant wishes to pursue,'" and thus, the court could be "assured that the clinics represent the rights and interests of the women seeking their assistance." Id. at 1348. The Terry court also held that "pro-choice" organizations had standing as representatives of their membership. Id. at 1349. Thus, plaintiffs have standing to enforce the Court's TRO.

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[10] While Schenck denied having read the TRO in his earlier testimony, the Court rejects that testimony as not credible.

II. Collateral Attack

Defendants, in arguing against the imposition of contempt sanctions, contend that the TRO is unconstitutional because it violates their First Amendment rights and is impermissibly vague and overbroad. The Court finds, however, that the collateral bar rule precludes defendants from challenging the validity of the underlying TRO as a defense against the imposition of contempt sanctions.

The collateral bar rule is longstanding and its purpose is clear.

> If a party can make himself a judge of the validity of orders that have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). "The orderly and expeditious administration of justice requires that `an order issued by a court with jurisdiction over the subject matter and the person must be obeyed by the parties until it is reversed by orderly and proper proceedings.'" Maness v. Meyers, 419 U.S. 449, 459 (1975) (quoting United States v. United Mine Workers, 330 U.S. 258, 293 (1947)). "A `contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.'" Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 441 n.21 (1986) (quoting Maggio v. Zeitz, 333 U.S. 56 (1948)).

The Supreme Court has applied the collateral bar rule

even when the underlying injunction may tread upon important First Amendment rights. In Walker v. City of Birmingham, 388 U.S. 307 (1967), the Court ruled that civil rights protestors, who were charged with contempt for marching in Birmingham without a parade permit in violation of a state court's temporary injunction, could not litigate the validity of the order in the contempt proceedings. The Court reached this conclusion despite serious reservations about the constitutionality of the underlying order. Id. at 317. The Court explained that:

> [N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

Id. at 320-21.

In the instant case, the Court has jurisdiction over the parties[11] and the subject matter.[12] The Court finds that its TRO is not transparently invalid, but rather was carefully crafted to protect defendants' First Amendment rights. The TRO was in

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[11] The Court will discuss its jurisdiction over Rev. Robert Schenck in more detail below.

[12] The defendants did make a motion to dismiss the case based on the abstention doctrine. However, in a Decision and Order dated October 29, 1990, the Court denied the motion.

effect for two months before the alleged violations and throughout that entire period none of the defendants moved to modify or vacate the TRO. In fact, the defendants, through their attorney, consented to the extension of the TRO until the Court decided plaintiffs' motion for a preliminary injunction. Had defendants refused to consent to the extension of the TRO, the Court would have been faced with the option of: (1) letting the TRO expire in accordance with Fed. R. Civ. P. 65(b); or (2) immediately converting the TRO into a preliminary injunction thereby making it an appealable order. Thus, defendants had ample opportunity to challenge the validity of the TRO directly before this Court and before the Second Circuit Court of Appeals, rather than through a contempt proceeding. Instead, they chose to consent to an extension of the TRO.

III. Civil Contempt Standard

A court can hold a party in civil contempt only when: (1) the order that the party allegedly failed to comply with is clear and unambiguous; (2) the proof of noncompliance is "clear and convincing"; and (3) the party has not been reasonably diligent and energetic in attempting to comply with the order. EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, 925 F.2d 588, 594 (2d Cir. 1991); Terry, 886 F.2d at 1351. It is not necessary for the plaintiff to prove that the defendant willfully disobeyed the order. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Donovan v. Sovereign Sec. Ltd., 726 F.2d 55, 59 (2d Cir. 1984). After applying this standard to the instant case, the Court finds that Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue were in civil contempt of the TRO on December 29, 1990.

A. The Order is Clear and Unambiguous

Fed. R. Civ. P. 65(d), requires that injunctions be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." The Rule was intended to prevent an uncertain or vague decree from becoming the basis for a contempt citation. See Schmidt v. Lessard, 414 U.S. 473 (1974). To comply with the specificity and clarity requirements of Rule 65, an injunction must be specific and definite enough to give a person of ordinary intelligence fair notice of what conduct is prohibited. Terry, 886 F.2d at 1352 (citing In re Baldwin-United Corp., 770 F.2d 328, 339 (2d Cir. 1985)); cf. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

The Court finds that the conduct that lay between that which was prohibited and that which was permitted by the proscriptions of the TRO was sufficiently clear for defendants to ascertain precisely what they could and could not do. Thus, the TRO is sufficient to serve as a foundation for a contempt citation.

B. Proof of Noncompliance

Civil contempt petitions require proof by "clear and convincing evidence." Terry, 886 F.2d at 1352; SEC v. American Bd. of Trade, 830 F.2d 431 (2d Cir. 1987), cert. denied, 485 U.S. 938 (1988). "Clear and convincing evidence" is an intermediate standard of proof that is beyond a "preponderance of the evidence" standard, but not as stringent as "beyond a reasonable doubt."Addington v. Texas, 441 U.S. 418, 424 (1979). This standard is appropriate for the protection of "particularly important individual interests" that nevertheless do not implicate the fundamental liberty interests found in criminal cases. Id. The "clear and convincing evidence" standard is met by evidence that produces in the mind of the trier of fact "an abiding conviction that the truth of [the] factual contentions are 'highly probable.'"

Colorado v. New Mexico, 467 U.S. 310, 316 (1984). After applying the "clear and convincing evidence" standard to this case, the Court finds that plaintiffs have met their burden of proving defendants' noncompliance with the TRO on December 29, 1990.

The evidence adduced at the hearing clearly showed that both Paul and Robert Schenck violated ¶ 1(a) of the TRO. Paragraph 1(a) enjoins defendants from

> trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into, or egress from any facility at which abortions are performed in the Western District of New York . . . .

During the first incident at 7:54 a.m., the Schencks entered the alcove at the Main Street entrance to 1241 Main Street and stood shoulder to shoulder so as to effectively block the entrance. This conduct violated ¶ 1(a)'s proscriptions against trespassing and blocking access to the clinic.

During the second incident at 8:11 a.m., Paul Schenck again entered the alcove and was therefore trespassing in violation of the ¶ 1(a).

During the third incident at about 8:14 a.m. involving the automobile in the driveway entrance to the clinic, Paul Schenck blocked and impeded the women inside the vehicle from entering the clinic in violation of ¶ 1(a).

The evidence adduced at the hearing also established that Paul Schenck violated ¶ 1(b) of the TRO. Paragraph 1(b) states in pertinent part that:

> [N]o one is required to accept or listen to sidewalk counseling and . . . if anyone who wants to, or who is sought to be counseled who wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event the persons seeking to counsel that person shall cease and desist from such counseling of that person.

During the fourth incident involving the young man and young woman exiting the clinic and walking to their automobile, Paul Schenck refused to cease and desist from speaking to the couple even after they clearly manifested their desire that he do so. This was a clear violation of ¶ 1(b).

The Court also finds that Paul and Robert Schenck violated ¶ 1(d) of the TRO. Paragraph 1(d) prohibits "inducing, encouraging, directing, aiding, or abetting in any manner, others to take any actions [to violate the Order]." The Schencks clearly encouraged, aided and abetted each other in violating the TRO. For example, they swapped neckties and eyeglasses in order to confuse people as to their identity.

As stated earlier, the evidence adduced at trial also established clearly and convincingly that Paul and Robert Schenck were present at 1241 Main Street on December 29, 1990 as part of Project Rescue and in furtherance of its goals, and that the Schencks were acting in concert with each other, with Project Rescue and with the other Project Rescue participants present that morning. Thus, Project Rescue, through its participants, Paul and Robert Schenck, also failed to comply with the TRO.

C. Reasonable Diligence

The Court finds that defendants were not reasonably diligent and energetic in attempting to achieve compliance with the TRO. To the contrary, the Court finds that defendants intentionally violated the TRO.

IV. The Alcove as a Quasi-public Forum

Defendants argue they were not trespassing when they entered the alcove to the clinic because it is a quasi-public forum. They contend that, because the clinic allows "pro-choice" escorts to stand in the alcove with their aprons on that read "PRO-CHOICE ESCORT," the alcove has been transformed into a quasi-public forum and therefore anybody can go into the alcove to demonstrate or distribute literature. This argument is without merit.

The entrance to a health care facility is not the legal or practical equivalent of an airport terminal or a shopping mall. It has none of the indicia of being open to all sorts of public activity and gatherings that have prompted courts to find that airport terminals and malls are public forums akin to public sidewalks or parks. In fact, numerous courts[13] have found that health care facilities are places where calm and quiet must be maintained, and that demonstrating activities of the sort associated with public or quasi-public forums are antithetical to that environment. See Beth Israel Hosp. v. NLRB, 437 U.S. 483, 507-08 (1978); Grayned v. Rockford, 408 U.S. 104 (1972); Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist., 670 F.2d 629, 632 (5th Cir. 1982).

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[13] Including this Court in the February 14, 1992 Preliminary Injunction Decision and Order.

V. Project Rescue

Project Rescue argues that it is a movement and not an entity capable of being held in contempt. However, in its February 14, 1992 Preliminary Injunction Decision and Order, the Court has already held that "Project Rescue possesses adequate characteristics of a legal entity to be enjoined or held in contempt." This is the law of the case.

Project Rescue also argues that it does not have the capacity to be sued under Fed. R. Civ. P. 17 since it is not a corporation or partnership. However, Rule 17 clearly states that an "unincorporated association . . . may . . . be sued in its common name for the purpose of enforcing . . . against it a substantive right under the Constitution or laws of the United States . . . ." Here, plaintiffs claim that Project Rescue is part of a conspiracy to deprive women of their constitutional rights to obtain an abortion and to travel interstate. Thus, Project Rescue does have the capacity to be sued.

VI. Notice to Robert Schenck

Robert Schenck contends that he cannot be found in contempt of the Court's order because he is not a named defendant and did not receive notice. The Court rejects this argument

Fed. R. Civ. P. 65(d) states in pertinent part that:

> [E]very restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or

otherwise.

As stated earlier, the Court finds by clear and convincing evidence that Robert Schenck had actual notice of the TRO. He admitted that he read it prior to December 29, 1990. Further, he was present on September 28, 1990 when the TRO was read over a loudspeaker by a United States Marshal. In addition, as stated earlier, the Court finds by clear and convincing evidence that Robert Schenck was acting in concert with other named defendants when he violated the TRO on December 29, 1990. Thus, Robert Schenck was bound by the TRO under Rule 65(d).

VII. Amount and Disposition of the Fines

When imposing civil contempt sanctions for the purpose of coercing compliance with a court order, a court should consider (1) the character and magnitude of the harm threatened by continued contempt; (2) the probable effectiveness of the proposed sanctions; and (3) the financial consequences of the sanction on the contemnor and the consequent seriousness of the burden of the sanction upon him or her. Terry, 697 F. Supp. 1324, 1332-33 (1988); 886 F.2d at 1353. "The ultimate consideration is whether the coercive sanction–here, a fine–is reasonable in relation to the facts." Terry, 886 F.2d at 1353 (citations omitted).

The TRO provides that failure to comply will subject the contemnor to civil damages of $10,000 per day for the first violation. The TRO further provides that for successive violations, the contemnor will be subject to a civil contempt fine double that of the previous fines.

The Court finds that the character and magnitude of the harm threatened by Paul Schenck, Robert Schenck and Project Rescue's continued contumacy is such that a substantial sanction

is appropriate. Unless they are sanctioned, their conduct may be emulated by other defendants and "pro-life" activists. Further, none of the defendants have made a showing that they would be unduly burdened by a substantial sanction.

Accordingly, the Court will order Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue to each pay $10,000 in damages to plaintiff Buffalo GYN Womenservices. Buffalo GYN Womenservices has made an uncontested showing of both actual injury, in the form of disrupted daily operations and patients rendered upset and distressed, and compensable loss, consisting of the cost of extra security measures and additional staff. Given this showing of actual injury and compensable loss, the Court finds that it is appropriate to award damages to Buffalo GYN Womenservices for defendants unlawful conduct. See New York v. Shore Realty Corp., 763 F.2d 49, 54 (2d Cir. 1985); Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979).

In addition to the contempt sanction, plaintiffs also seek all costs and attorneys' fees associated with enforcing the Court's TRO. The TRO provides that a contemnor is liable "for all attorneys fees and related costs incurred by plaintiffs in relation to the enforcement of this Order." In addition, it is well established that a successful complainant in a contempt proceeding is entitled to the reasonable costs of prosecuting the contempt, including attorneys' fees, if the violation of the court's order is found to have been wilful. Canterbury Belts, Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 39 (2d Cir. 1989); Vuitton, 592 F.2d at 130.

In this case, the TRO clearly put defendants on notice that they could be held liable for attorneys' fees and costs associated with enforcement of the Order. Thus plaintiffs are entitled to attorneys' fees and related costs. Further, the Court

finds that defendants' violations of the TRO were wilful.

CONCLUSION

For the reasons stated, the Court grants plaintiffs' petition for civil contempt against Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue. The Clerk of Court shall immediately enter judgments against Paul Schenck, Robert Schenck and Project Rescue in the amount of $10,000 each. In addition, the Court grants plaintiffs' request for reasonable attorneys' fees and costs associated with prosecuting the contempt. Plaintiffs shall file an affidavit of attorneys' fees and costs by October 16, 1992. Defendants shall have until November 6, 1992 to respond.

It is so ordered.

/s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

Dated: September 14, 1992

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

Plaintiffs-Appellees,

-v-

PROJECT RESCUE WESTERN NEW YORK, ET AL.,

Defendants,

PAUL SCHENCK and DWIGHT SAUNDERS,

Defendants-Appellants.

ORDER
92-7302

[Filed Dec. 30, 1994]

A petition for rehearing containing a suggestion for a rehearing in banc having been filed by appellees, and

A poll of the judges in regular active service having been requested and taken, and a majority of the active judges of the Court having voted to rehear the appeal in banc, limited to the two issues identified in the appellees' suggestion for rehearing in banc,

It is hereby ORDERED that the appeal will be heard in banc, limited to the issues of whether the District Court erred in including in the injunction the provision concerning a 15-foot buffer zone and the "cease and desist" provision. The in banc court will consist of all the active judges of the Court and senior

Judges Oakes and Meskill, who were members of the panel. See 28 U.S.C. § 46(c).

The appellants' brief shall be filed by February 10, 1995, the appellees' brief shall be filed by March 17, 1995, the appellants' reply brief shall be filed by April 3, 1995, and oral argument will be held at the United States Courthouse, Foley Square, at 2:00 p.m., April 17, 1995.

FOR THE COURT

GEORGE LANGE III, Clerk
By: /s/ Kathleen Brouwer
Kathleen Brouwer
Operations Manager

Dated: New York, NY
December 30, 1994

JON

WDNY/bfny
90-cv-1004
ARCARA

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of February, one thousand nine hundred and ninety-five.

PRO-CHOICE NETWORK, of Western New York, ET AL.,
Plaintiffs-Appellees,

v. 92-7302

REV. PAUL SCHENCK, ET AL.,
Defendants-Appellants.

PROJECT RESCUE WESTERN NEW YORK, ET AL.,
Defendants.

ORDER
[Filed Feb. 2, 1995]

The mandate of this Court having been issued inadvertently on October 3, 1994, and recalled on October 13, 1994; the District Court having modified the preliminary injunction on October 13, 1994, to conform to the panel's opinion; and the Court of Appeals having ordered a rehearing in

banc on December 30, 1994, it is hereby Ordered that the District Court's preliminary injunction, as originally issued on February 14, 1992, is reinstated pending disposition of the appeal.

FOR THE COURT

/s/ Jon O. Newman
JON O. NEWMAN, Chief Judge.